The EU VAT treatment of vouchers in the context of promotional activities

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The EU VAT Treatment of Vouchers in the Context of Promotional Activities

The EU VAT treatment of Vouchers in the Context of Promotional Activities

De Unierechtelijke btw-behandeling van vouchers in het licht van promotionele activiteiten

PROEFSCHRIFT
ter verkrijging van de graad van doctor
aan Tilburg University
op gezag van prof. dr. G.M. Duijsters,
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vervangend voorzitter van het college voor promoties,
in het openbaar te verdedigen ten overstaan van een
door het college voor promoties aangewezen commissie
in de aula van de Universiteit
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door

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Preface

Years ago I decided, unsuspecting and underestimating everything, to start this research. From the start of my career in VAT, I was interested in the VAT treatment of vouchers. It was the topic of one of my first publications, in 2003. The tension between a business' right to deduct VAT incurred on business costs (promotional activities) and the fact that these promotional activities often lead to private consumption, which needs to be taxed, deserved proper research. Adding the voucher dimension made it even more challenging.

VAT is not the only thing that I find interesting, and not the most relevant thing in my life. During my research, other relevant things happened: I met my wife, we got married, I changed jobs, we had three daughters, etc.). This meant that I spent more time on this research than average. As a consequence, the rules I was trying to capture and describe changed substantially during the period of my research. In 2012, the EU legislator proposed rules for the EU VAT treatment of voucher transactions. This meant substantial parts of the research had to be rewritten. The EU VAT rules that finally came into force in 2019 were different from the originally proposed rules, which meant more adjustments. And of course the Court of Justice of the European Union also ruled several cases on the topic. If anything, I learnt that you shouldn't take too long finishing your research.

I have experienced my research as a journey. This book is a travel guide that could help travellers negotiate parts of the ever-changing landscape that is EU VAT. A landscape that is sometimes covered in thick mist. A landscape resembling a marshland, constantly changing: sometimes paths disappear, to be replaced by new, clearer routes but also by paths that are only described but not actually tested yet. I've tried to find the most sensible routes to some destinations, explaining in this travel guide why I prefer certain routes to others and where possible alternative routes could lead. I hope that this guide has lifted some of the fog and allows travellers to navigate parts of the VAT landscape more confidently.

I would like to take this opportunity to thank the people that have contributed to the realisation of this research.

I would like to thank Mariken van Hilten, René van der Paardt, Peter Essers and Kenneth Vyncke for agreeing to be part of the PhD committee. I appreciate the honest feedback they provided and their time and effort.

I would of course like to thank my two supervisors, Herman van Kesteren and Gert-Jan van Norden. Herman was involved from the beginning, and even though he may not have always believed that I would finish my research (and I had the same), he was always enthusiastic and supportive, and by the time we both started believing that the actual end could actually be in sight, he proved invaluable in his support, comments

and enthusiastic sparring sessions. Gert-Jan was appointed as my sponsor somewhat later, because the rules regarding the PhD-process were changed during the period of my research. Gert-Jan proved to be not only very discerning in an extremely positive way, but also of great help guiding me through the last crucial practical stages of the process. Both Herman and Gert-Jan focussed on improving the end result as much as possible, and their input was invaluable.

I also owe gratitude to my current employer, EY, as well as my previous employer. They believed in the added value of this process and allowed me more latitude than I could have hoped for. It would have not been possible to finish this research without their support.

I owe my friends and family a special thank you. The time spent on this research was time not spent on them. I'm sure that I cannot make this up to them, but I promise I will do my best.

Finally, a special and enormous thank you to Lizzie. Even though this research took away much time that we could and probably should have spent together, you never stopped believing in me and supporting me. You, together with Olivia, Emily and Louisa, have always been my greatest inspiration. You were there to help me get out of the depths of despair whenever I got stuck, and you were there to celebrate any progress or success with me. I couldn't have done this without you. Thank you.

This manuscript was finalised on 1 March 2019. Legislation, regulations and case law published after that date have not been included.

Laren, May 2019.

Jeroen Bijl

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Abbreviations

AG	Advocate General of the CJEU
CJEU	Court of Justice of the European Union
CTP	Certified Taxable Person
DVD	Digital Versatile Disc
e.g.	exempli gratia
EU	European Union
EU VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).
FASB	Financial Accounting Standards Board
GAAP	Generally Accepted Accounting Principles
IAS	International Accounting Standards
IASB	International Accounting Standards Board
i.e.	id est
IFRS	Internatonal Financial Reporting Standards
JB	Jeroen Bijl
MPV	Multi purpose voucher
No.	Number
OJ	Official Journal of the European Union
p.	page
Par.	Paragraph
pp.	pages
Proposal	Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206.
Sixth Directive	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1–40)
SPV	Single purpose voucher
TOMS	Tour-operator margin scheme
UK	United Kingdom
US	United States of America
US GAAP	Generally Accepted Accounting Principles applicable in the United States of America
VAT	Value added tax

1 Introduction

Vouchers are used for many different purposes, and vouchers have many shapes and forms. Vouchers can have a ‘face value’ printed on them, allowing the holder of that voucher to use it as consideration (payment) for goods or services to be provided by businesses that have agreed to accept these vouchers. Vouchers can also allow the holder a certain discount to a (future) purchase, or a refund of part of the purchase price of a product. Vouchers can be issued when purchasing goods or services, for no additional charge. Vouchers can be sold. Voucher can be printed in newspapers or on-line. Some vouchers are sold by one business and will allow the holder a discount at a different business. Outside the ‘realms of business promotion’, vouchers are also used as, for example, school vouchers, travel vouchers and meal vouchers. What all of these vouchers have in common is that they represent the entitlement of the holder to something.

From a VAT perspective, taxing ‘the entitlement to something’ has proven difficult. For example, because different EU Member States applied a different VAT treatment to transactions involving vouchers, the European legislator has worked for more than ten years on a common set of rules regarding the VAT treatment of vouchers. In this research, I have tried to establish how voucher transactions should be treated from a VAT perspective, using (amongst other things) the ‘economic and commercial reality’ of these transactions as a test to see how the current treatment, based on existing legislation and case law, compares to what in my view is the desired or appropriate VAT treatment of such transactions.

In this research, I argue and substantiate why transactions involving vouchers do not need a specific VAT treatment. Issuing, selling and redeeming vouchers are, in my view, not transactions that should be, as such, subject to VAT. The vouchers are, as I will advocate, only a form of practical means that enable certain transactions to be performed. In my view, only the transactions for which the vouchers are used are relevant from a VAT perspective. Because there are VAT rules for voucher transactions, I will, however, review and discuss these rules.

Because vouchers are (most) often used for promotional activities, and because promotional activities have a very specific VAT treatment, I will research the VAT treatment of promotional activities in order to establish the desired or appropriate VAT treatment of these transactions where they involve the use of vouchers. Because the range of different types of promotional activities also includes the types of non-promotional transactions for which vouchers are used, this method should cover the relevant types of transactions involving vouchers from a VAT perspective. Therefore, I will research the VAT treatment of promotional activities before I focus on voucher transactions. In the chapter about vouchers, this research of the VAT treatment of promotional activities will culminate in a comprehensive review of the current as well as the desired or appropriate VAT treatment of transactions involving vouchers.

1.1 Vouchers, promotional activities and EU VAT

Many businesses perform promotional activities. If a business wants to grow its turnover, it needs to sell more of its products, whether they are goods, services or both. Growing turnover requires either existing customers to purchase more or to increase the amount of customers that buy the products. Promotional activities are employed to entice existing customers to make more purchases and potential new customers to actually start buying a business's products. Performing these promotional activities is, therefore, very much in the interest of the business and for the purpose of ensuring the continuation, if not growth, of the business. The costs of these promotional activities are business costs.

Promotional activities can be categorised into several types of activities, such as advertising, press releases, consumer promotions (schemes, discounts, contests), trade discounts, freebies, incentive trips, awards etc. Sales promotions, as distinct from advertising, publicity and public relations, include freebies, contests, discounts, free services, passes, tickets etc.[1]

Some promotional activities allow customers to purchase several items for a price that is lower than the combined shelf price of the individual products. Some of those products may be advertised as 'free' with the purchase of other goods or services. Discounts on the purchase of a single product can also be considered a sales promotion. Some businesses organise prize contests or lotteries to promote their products and/or brand. And, finally, vouchers are often used as sales promotion. Vouchers have many shapes and forms. Some examples are book tokens, cash-back coupons and gift cards, but also loyalty reward 'points'. The VAT treatment of these promotional activities is not very straight forward, even since the EU legislator introduced new rules on the VAT treatment of (transactions involving) vouchers.[2]

Sales promotions[3] are one of the aspects of what is referred to by some as 'the marketing mix': [4] the four controllable variables that are combined to appeal to a business' target market, the other three being product, price and place (distribution). Promotional activities refer to the entire set of activities, which communicate the product, brand or service to the user. The idea is to make people aware, attract and induce to buy the product, in preference over others. For the purpose of this research, I will only look at 'sales promotions'. I will use the blanket term 'promotional activities' to refer to 'sales promotions'.

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[1] G.D. Harrell, Marketing – Connecting with Customers, Prentice Hall, 2004, Ogden-Barnes, S. and Minahan, S., Sales Promotion Decision Making, Business Expert Press, 2015 and Yeshin, T., Sales Promotion, Cengage Learning, 2006.

[2] Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ 2016, L 177, p. 9.

[3] See G.D. Harrell, Marketing – Connecting with Customers, Prentice Hall, 2004, pp. 479 and 484.

[4] See G.D. Harrell, Marketing – Connecting with Customers, Prentice Hall, 2004, p. 6.

From a VAT[5] perspective, these 'sales promotions' are most challenging because they can at the same time be considered an essential business costs (for the business performing these promotional activities) as well as a transaction leading to consumption at the customer's end of the transaction. From a VAT perspective, VAT on business costs is generally deductible, unless the costs are attributable to specific activities that disallow VAT deduction, such as certain VAT exempt transactions and non-economic activities. On the other hand, some promotional activities provide customers and potential customers of businesses with free goods or services. A basic rule of VAT is that consumption should be taxed: the EU VAT is a general tax on consumption.[6] Taxation can be achieved in different ways, e.g. by adjusting the initial VAT deduction or by actually taxing the supplies that are made free-of-charge. This is especially true for transactions that occur at the end of a production and distribution chain (the business-to-consumer or B2C supplies) because by definition, these need to be taxed under the rationale underlying the EU VAT system. Consumers cannot deduct VAT – consumption has to be taxed. The tension between the right to deduct VAT on business related costs and the need to tax consumption makes the area of sales promotions a very rewarding research topic.

Vouchers are used by businesses in a wide range of promotional activities. Vouchers can be gift cards that are sold for consideration, enabling businesses to receive payments (at the time of the sale of the voucher) before they actually make a supply of a good or a service. Voucher can also be used to allow customers a discount, e.g. on the price of a specific product or on designated products for a specific period of time. Recent research in the field of VAT and promotional activities exists,[7] but not specifically focussed on the VAT treatment of vouchers (as used for promotional activities).

Because vouchers are used as instruments in a wide range of promotional activities, I will first focus on the current VAT treatment of promotional activities as such and how, in my view, these activities should be treated for VAT purposes. I will then research how the use of vouchers in these promotional activities is treated for VAT purposes and how, in my view, this 'use of vouchers' should be treated for VAT purposes. I started writing this research a long time ago, before the Commission presented its view on the VAT treatment of vouchers. By the time I finished this research, the EU rules for the VAT treatment of certain vouchers were accepted by the EU Member States and these rules came into force on 1 January 2019. In this thesis, I will explain

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[5] Where I use 'VAT' I mean EU VAT as applied in the EU Member States under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

[6] See Article 1 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1), hereinafter referred to as 'the EU VAT Directive'.

[7] The doctoral thesis of Nathalie Wittock, titled 'Sales promotion techniques and VAT – A search for neutrality for the sales promoter, also taking into account the other key features and principles of the VAT system' was publicly defended on 15 December 2017, and had not been published at the time of closing this document. See also Nathalie Wittock, Sales Promotion Techniques and VAT, EC Tax Review 2018/3, pp. 127-138.

why I don't think that these new rules represent the ideal VAT treatment of transactions involving vouchers, even though the new rules do provide for a more uniform interpretation and therefore provide more legal certainty for businesses using vouchers in the EU.

1.2 Focus of the research (conceptual framework): the EU VAT treatment of vouchers, in the context of promotional activities

EU VAT aims to tax (final) consumption.[8] In that regard, certain transactions for which no (real) consideration is received by the taxable person, are treated as supplies of goods or services effected for consideration subject to VAT. The purpose of those provisions is to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type against payment. The taxation of these transactions is designed to prevent situations in which final consumption is untaxed.[9]

The CJEU has repeatedly held that the right of VAT deduction is an integral part of the VAT scheme and in principle may not be limited.[10] That right must be exercised immediately in respect of all the taxes charged on input transactions. Any limitation on the right to deduct VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for in the EU VAT Directive.[11]

Within this playing field of VAT deduction and taxation, it is also possible that transactions are performed for no consideration and for private individuals, but for purposes which are not other than those of the business. In such cases, the personal benefit derived by individuals from such transactions is of only secondary importance compared to the needs of the business.[12] These transactions should not be taxed under the provisions mentioned above. The EU VAT Directive also explicitly excludes

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8 See Article 1 of the EU VAT Directive.

9 See CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraphs 17 and 18.

10 See, for example, CJEU case C-62/93, BP Soupergaz Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greek State, ECLI:EU:C:1995:223, paragraph 18, Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others v Agencia Estatal de Administración Tributaria (AEAT), ECLI:EU:C:2000:145, paragraph 43, CJEU joined Joined Cases C-177/99 and C-181/99, Ampafrance SA v Directeur des services fiscaux de Maine-et-Loire (C-177/99) and Sanofi Synthelabo v Directeur des services fiscaux du Val-de-Marne (C-181/99), ECLI:EU:C:2000:470, paragraph 34 case C-409/99, Metropol Treuhand Wirtschaftsstreuhandgmbh v Finanzlandesdirektion für Steiermark and Michael Stadler v Finanzlandesdirektion für Vorarlberg, ECLI:EU:C:2002:2, paragraph 42.

11 See, for example, CJEU case C-409/99, Metropol Treuhand Wirtschaftsstreuhandgmbh v Finanzlandesdirektion für Steiermark and Michael Stadler v Finanzlandesdirektion für Vorarlberg, ECLI:EU:C:2002:2, paragraph 42.

12 See CJEU case C-258/95, Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraph 30.

the application of goods for business use as samples or as gifts of small value from being taxed.[13]

The EU VAT rules don't allow businesses to deduct the VAT on costs that are directly linked to specific VAT exempt transactions, such as lotteries and other games of chance.[14] One of the questions I will examine in this research concerns the deductibility of VAT where a business organises a free lottery or sweepstake in order to promote its business, where that business would have the right to fully deduct VAT on any costs directly related to his usual/normal business activities.

The VAT treatment of granting discounts or rebates, as included in the EU VAT Directive and as developed by the CJEU, is in my view not always clear nor compatible with the relevant principles underlying the EU VAT system. This is even more the case where vouchers are involved. It has taken the EU a long time to introduce specific rules regarding the VAT treatment of transactions involving vouchers, and these rules only apply to specific species of vouchers, leaving the VAT treatment of other types of vouchers to be dealt with by the EU Member States The new rules also raise some fundamental questions of their own.

The types of sales promotions I will examine in this research are discounts, supplies free of charge as part of a combination of supplies as well as separate from any other supply, including samples and reward goods, barter transactions, free prize contests and vouchers (including coupons, gift cards, loyalty points etc.). The chapter about the VAT treatment of vouchers (Chapter 9) is largely based on the VAT treatment of the type of promotional activities for which they are used, as described in the chapters before I go into the VAT treatment of transactions involving vouchers.

I have identified and chosen these specific promotional activities because in my view, all relevant VAT related questions that I will research are represented in these promotional activities. I am sure that businesses will apply and introduce countless other promotional activities, now and in the future, but in my view, the relevant basic VAT questions that I will examine and answer in this research will remain the same.[15]

I have chosen the VAT treatment of transactions involving vouchers as the focal point of this research, because it has become clear that legislators, courts and businesses struggle with this specific topic. Even though the EU legislator has tried to solve some of the issues in this respect, I will explain that these new rules may still require improvement. Also, the transactions involving vouchers that are not covered by these new rules pose challenges by themselves, and I will address these challenges in this research. My aim is to find the most optimal way of treating transactions involving vouchers, from a VAT perspective, based on the principles underlying the EU VAT

[13] See Article 16, second paragraph, of the EU VAT Directive.

[14] See Article 135(1)(i) of the EU VAT Directive.

[15] Unless the current EU VAT rules themselves are changed.

system and the economic reality of these transactions, as I will explain in Sections 2.4 and 2.5.

1.3 Research questions

This research is aimed at answering how transactions involving vouchers should be treated from an EU VAT perspective, under the current rules as well as under desired or appropriate rules/law, as (amongst other things) based on the economic and commercial reality of the relevant transactions. Given that voucher transactions can take many different shapes and forms, I have based this research on the VAT treatment of the promotional activities underlying the voucher transactions. This means that I will also have to establish the current and desired or appropriate VAT treatment of these underlying promotional activities. For that purpose, I will also answer the following, preliminary, questions:

- How to determine whether a supply is made free of charge?
- How to determine whether a supply that is part of a composite supply (or: an element in a composite supply) that is made for consideration, is made free of charge?
- What is and what should be the VAT treatment of discounts or rebates granted to other persons than the actual recipient of the original transaction?
- Which free supplies are and should be taxed and how can this be best achieved?
- What is and what should be the taxable basis or taxable amount for free supplies?
- What is and what should be the taxable amount or taxable basis for barter transactions?
- Can the VAT on costs incurred for performing promotional activities always be fully deducted? Should it always be deductible?

The culmination of the answers to the above questions will then lead to the answer to the final question:

- How should transactions involving vouchers, in the context of promotional activities, be treated from an EU VAT perspective?

Where I answer the question about how certain transactions should be treated from an EU VAT perspective, I will test this ‘desired’ treatment against the referencing system I describe in Section 1.4.

Where relevant, I will answer these questions, applying positive EU law and case law and testing this against the basic principles of EU VAT as well as the main features of EU VAT.

1.4 Research framework and referencing system

In order to be able to answer the above questions, a referencing system or research framework is required. I will use positive law as a first reference system: I will use both the EU VAT rules and regulations, including the EU VAT rules regarding the VAT treatment of transactions that involve the use of vouchers as applicable from 1

January 2019, as well as CJEU case law on the relevant topics. It is possible that positive law, or rather the application thereof to promotional activities, is not in line with what I consider to be 'desired law' or 'appropriate law'. By appropriate law I mean a principled approach that is in line with the principles of justice and fairness.[16] Appropriate law should, therefore, be based on and founded on the (relevant) fundamental principles underlying the EU VAT system as well as the basic features of the EU VAT system. I will also use 'economic reality' or 'commercial reality' as a reflection of justice and fairness, using it as a reference for testing whether positive law is in line with appropriate law. Therefore, I will have to clearly outline this framework and referencing system. Where I find that the application of positive law for determining the VAT treatment of promotional activities is not in line with appropriate law, I will provide guidance for formulating appropriate law and, where possible, actually provide suggestions for appropriate law.

1.5 Relevance of the research

For the EU, VAT in itself is relevant for various reasons. The common Value Added Tax (VAT) system plays an important role in the European Union's Single Market. It was originally put in place to do away with turnover taxes which distorted competition and hindered the free movement of goods and to remove fiscal checks and formalities at internal borders.[17] It is a major and growing source of revenue in the EU,[18] raising almost EUR 1 trillion in 2014, corresponding to 7% of EU GDP.[19] One of the EU's own resources is also based on VAT. EU Member States should for this purpose all pay 0.3% (on average) of the harmonised VAT assessment bases determined according to Union rules.[20] This means that the correct application of the EU VAT rules can have a relevant financial impact.

Also, under one of the fundamental principles underlying the EU VAT system (the principle of 'neutrality'), similar transactions should be treated equally for VAT purposes.[21] For voucher transactions as well as the underlying promotional activities, this means that where a business decides to apply a certain promotional activity (involving vouchers), the VAT treatment thereof should be the same in all EU Member States but also the VAT treatment of similar promotional activities should be the same.

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16 R. Wolfram and V. Röben (Eds.), Legitimacy in International Law, Springer (Germany), 2008, p. 385.

17 Press Release from the European Commission, 7 April 2016, IP/16/1022.

18 See also, for example, S.B. Cornielje, Fusies en overnames in de Europese BTW, Fiscale Monografieën nr. 146), Deventer (Netherlands): Wolters Kluwer 2016, p. 6.

19 Press Release from the European Commission, 7 April 2016, IP/16/1022.

20 2007/436/EC, Euratom: Council Decision of 7 June 2007 on the system of the European Communities' own resources, OJ L 163, 23.6.2007, p. 17–21, Article 2(1)(b) and 2(4). The assessment base to be taken into account for this purpose shall not exceed 50 % of GNI for each Member State, as defined in paragraph 7 of Article 2 of this Council Decision.

21 A.J. van Doesum, H.W.M. van Kesteren, G.J van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 38.

Given the abundance of preliminary questions about the VAT treatment of various promotional activities (or transactions that apply the same principles as promotional activities) that have been referred to the CJEU,[22] it seems that neutrality has not been fully achieved yet.

The EU VAT rules did, until the adoption of the rules that will be applicable from 1 January 2019, not provide for specific rules on the treatment of transactions involving vouchers. Using a voucher in a taxable transaction can have consequences for the taxable amount, the time of a transaction and even in certain circumstances, the place of taxation. Uncertainty about the correct tax treatment can be problematic for cross-border transactions and for chain transactions in the commercial distribution of vouchers. The absence of common rules has obliged Member States to develop their own solutions, inevitably uncoordinated. The resultant mismatches in taxation cause problems such as double or non-taxation but also contribute to tax avoidance and form barriers to business innovation. Moreover, increased functionality in vouchers has made the distinction between vouchers and more generalised payment instruments less clear.[23] The VAT rules that are applicable from 1 January 2019 do not apply to all

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[22] See,for example, CJEU cases 230/87, Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise, ECLI:EU:C:1988:508, C-126/88, Boots Company plc v Commissioners of Customs and Excise, ECLI:EU:C:1990:136, C-68/92, Commission of the European Communities v French Republic, ECLI:EU:C:1993:888, C-33/93, Empire Stores Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1994:225, C-288/94, Argos Distributors Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1996:398, C-317/94, Elida Gibbs Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1996:400, C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, C-108/00, Syndicat des producteurs indépendants (SPI) v Ministère de l'Economie, des Finances et de l'Industrie, ECLI:EU:C:2001:173, C-86/99, Freemans plc v Commissioners of Customs & Excise, ECLI:EU:C:2001:291, C-380/99, Bertelsmann AG v Finanzamt Wiedenbrück, ECLI:EU:C:2001:372, C-184/00, Office des produits wallons ASBL v Belgian State, ECLI:EU:C:2001:629, C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, C-398/99, Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2003:20, C-438/01, Design Concept SA v Flanders Expo SA, ECLI:EU:C:2003:325, C-149/01, Commissioners of Customs & Excise v First Choice Holidays plc, ECLI:EU:C:2003:358, C-412/03, Hotel Scandic Gåsabäck AB v Riksskatteverket, ECLI:EU:C:2005:47, C-1/08, Athesia Druck Srl v Ministero dell'economia e delle finanze and Agenzia delle entrate, ECLI:EU:C:2009:108, C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590, C-270/09, Macdonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780, C-300/12, Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH, ECLI:EU:C:2014:8, C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745 and C-462/16, Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG, ECLI:EU:C:2017:1006.

[23] From the Explanatory Memorandum to the original Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012) 206 final of 10 June 2012, under "Grounds for and objectives of the proposal", p. 2.

types of vouchers and do not solve all relevant issues, as I will demonstrate in this research.

Certainty enables businesses to perform well, grow and thrive. A stable business environment requires certainty about how the relevant rules should be applied. Ensuring legal certainty is one of the EU VAT system's objectives.[24] From the above it is clear that currently, there is a lack of legal certainty regarding the VAT treatment of many promotional activities. This research aims at providing more unambiguous suggestions for the VAT treatment of promotional activities where application of the current EU VAT rules fails to do so. Where EU VAT rules and CJEU case law are not in line with the basic features or the fundamental principles underlying the EU VAT system, I will provide alternatives that should bring the VAT treatment of those activities more in line with these features and principles.

1.6 Research method and structure

Because this research focuses on EU VAT, I will take the provisions of the EU VAT Directive and other EU VAT rules, as well as the interpretation of those provisions by the CJEU, as a first point of reference. Because of the fact that the EU VAT Directive is transposed into the national law of all EU Member States and because the relevant rules are applied and interpreted by taxable persons, tax authorities, courts and other parties, I will make reference to local rules and regulations where I have deemed this appropriate. Given the fact that most of the CJEU cases regarding the VAT treatment of voucher transactions as well as other promotional activities were referrals from UK courts, I will use the UK as a local reference country. Also, the UK tax authorities (Her Majesty's Revenue and Customs) have published a lot of guidance on the VAT treatment of these transactions. I have also chosen the Netherlands as a country for local reference, because of its rich tradition of academic research and publications on VAT and also because the Netherlands has a thriving market for vouchers, tokens, coupons and similar instruments. Therefore, when looking at the specific application of VAT rules regarding voucher transactions and promotional activities, I will mainly rely on the relevant VAT rules and regulations as applicable in the Netherlands and the UK. Besides using the EU VAT rules and regulations as well as CJEU case law as a referencing system, I will also make reference to international literature on the topic of value added taxation in order to ensure that I take account of as many relevant viewpoints and (possible) building blocks for answering the research questions as possible.

I have divided the research into specific types of promotional activities that I will examine, using the above referencing system and research framework to answer the research questions that are relevant to those specific promotional activities.

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[24] See, for example, CJEU case C-259/11, DTZ Zadelhoff vof v Staatssecretaris van Financiën, ECLI:EU:C:2012:423, paragraph 25.

1.7 Scope of the research

For this research I examine the EU VAT treatment of voucher in the context of promotional activities. Because, as I will demonstrate, the VAT treatment of vouchers greatly depends on the VAT treatment of the underlying transactions, I will start by examining the current EU VAT treatment of promotional activities. Where possible, I compare this treatment under positive law with the treatment under desired law or appropriate law. I will examine different types of promotional activities that, together, provide for a comprehensive overview of all relevant VAT issues surrounding promotional activities. I will, where appropriate, look into whether a supply is made for consideration, the question whether VAT on costs attributable to supplies that are not made for consideration can be deducted and how to determine the taxable amount (the basis for calculating the VAT due) for transactions that are not performed for considerations and for barter transactions. Further, I will examine when and how to adjust the taxable basis where a business provides discounts, rebates or cash-backs. I will also investigate whether it is always appropriate to tax supplies that are not made for consideration. Also, I will examine the VAT treatment of promotional lotteries and other games of chance, as well as promotional activities that involve vouchers (in the broadest sense of that concept). I will examine all these promotional activities within the framework of the EU VAT rules, CJEU case law as well as desired or appropriate law, where this deviates from positive law. After that, I will examine the current EU VAT treatment of vouchers, and compare this treatment under positive law with the treatment under desired law or appropriate law.

I will not examine the EU VAT treatment of all possible promotional activities. For example, I will not examine the VAT treatment of advertisement services, the supply of cause-related products,[25] point-of-sale promotions,[26] end-cap marketing,[27] customer appreciation events or after-sale customer surveys. The VAT treatment of these activities can be very interesting, but they will never involve the use of vouchers, and vouchers are the ultimate focus of my research.[28] This research focuses on the promotional activities performed by the business whose products or activities are promoted himself. These are the activities that warrant taxation since they may lead to private consumption, and that should also not create a VAT cost because these activities are performed for the purposes of (promoting) the business' (taxable) activities. That's why this research focuses on the VAT treatment of vouchers in the

[25] Cause-related marketing is a mutually beneficial collaboration between a corporation and a nonprofit designed to promote the former's sales and the latter's cause.

[26] Point-of-sale displays (POS) are a specialized form of sales promotion found near, on, or next to a checkout counter (the "point of sale"). They are intended to draw the customers' attention to products.

[27] An endcap, or end cap, is a display for a product placed at the end of an aisle. It is perceived to give a brand a competitive advantage.

[28] Where these promotional activities imply a barter transaction, the VAT treatment of these transactions will be clarified in the Chapter 7 on the VAT treatment of Barter Transactions.

context of promotional activities as performed by the business whose own goods or transactions are promoted.

1.8 Approach of the research

A research framework or referencing system is necessary for examining the VAT treatment of promotional activities, because I need a framework to establish whether the VAT treatment of promotional activities as based on positive law is in line with the (relevant) fundamental principles underlying the EU VAT system as well as the basic features of the EU VAT system. Therefore, I will first describe the theoretical framework and referencing system in Chapter 2.

In Chapter 3, I describe the current VAT treatment of transactions that are subject to VAT and economic activities in general, focussing on the 'direct link' that is necessary for linking a payment (in cash or in kind) to a supply of goods or services, making it 'consideration' from a VAT perspective. If there is no consideration, a supply is made free of charge, which can have a different VAT treatment from a supply made for consideration.

Before examining the VAT treatment of supplies that are not made for consideration, I will examine in Chapter 4 how composite supplies (multiple-element supplies) are and should be treated from a VAT perspective, focussing on combination deals and how to determine whether certain elements or components of a combination deal are or should be considered to be made free of charge. I will also examine how to allocate a single consideration that is paid to a composite supply.

After looking into the VAT treatment of composite supplies, I examine the VAT treatment of supplies where the advertised or original consideration is decreased, but not to the full amount: discounts and rebates. In Chapter 5, I examine the current rules for the VAT treatment of discounts, rebates and cash-backs, especially in cross-border situations and where the business granting the discount or rebate leapfrogs his original customer by granting a cash-back to a customer further down the supply chain.

In Chapter 6, I look at the VAT treatment of supplies that are made for no consideration (i.e. for free). If such transactions lead to consumption, should they be subject to VAT? Or should the VAT that was initially deducted on the purchase of the elements of the supply be adjusted? I will focus on goods and services that are supplied for free as promotional activities or part thereof, which means that I also examine under what circumstances a free supply that is made both for business purposes and that can lead to untaxed consumption should be taxed, and how.

In the last three chapters, I examine other specific types of promotional activities, starting with the VAT treatment of bartering in Chapter 7. In Chapter 8, I look into the VAT treatment of organising prize contests, lotteries and the like where the business

does not charge a consideration for participating in the contest and where prizes are given away to winners of those contests.

In the last chapter of this research, Chapter 9, all previous promotional activities come together in a specific promotional scheme: the use of vouchers (in the broadest sense of that word). I examine the VAT treatment of using vouchers for transactions, in situations where the vouchers are sold for consideration or the business that accepts the voucher in return for a supply is compensated or paid by the issuer of the voucher, as well as transactions involving 'free' vouchers. I specifically examine the current EU VAT rules for vouchers (as applicable from 1 January 2019), where I find that these new rules seem to allow room for improvement. I also give some suggestions in that respect.

I have not dedicated a separate Chapter to the deduction of VAT incurred on costs relating to promotional activities and voucher transactions. Instead, where relevant, VAT deduction is included in each Chapter separately, because VAT deduction depends on the nature of the transactions for which the relevant costs are incurred, and each Chapter is dedicated to a specific type of promotional transactions or activities.

I end this research with a summary in Chapter 10, where I examine whether all research questions have been addressed and answered in a satisfactory manner and where I provide an overview of the main topics that I examined as well as any suggestions that I made with regard to desired or appropriate law.

2 Research framework

In this research, I will examine the VAT treatment vouchers, in the light of the VAT treatment of promotional activities. Positive law will be the starting point for determining the VAT treatment promotional activities, which means that I will first have to define 'positive law'. I will then test whether the VAT treatment of vouchers and promotional activities is in line with economic reality as a manifestation of 'neutrality' and with the purpose of EU VAT as a tax on expenditure for private consumption, which I will discuss in Sections 2.4 and 2.5.

2.1 Positive EU law

The main pieces of positive law with regard to EU VAT consists of a number of Directives, a Council Regulation and an Implementing Regulation:

- The EU VAT Directive,[29]
- The VAT Refund Directive for EU Businesses,[30]
- The VAT Refund Directive for non-EU Businesses,[31]
- The Directive on VAT free importations,[32]

[29] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 December 2006, p. 1–118, as amended by COUNCIL DIRECTIVE 2006/138/EC of 19 December 2006, OJ L 384, p. 92, COUNCIL DIRECTIVE 2006/138/EC of 19 December 2006, OJ L 384, p. 92, COUNCIL DIRECTIVE 2008/8/EC of 12 February 2008, OJ L 44, p. 11, COUNCIL DIRECTIVE 2008/117/EC of 16 December 2008, OJ L 14, p. 7, COUNCIL DIRECTIVE 2009/47/EC of 5 May 2009, OJ L 116, p. 18, COUNCIL DIRECTIVE 2009/69/EC of 25 June 2009, OJ L 175, p. 12, COUNCIL DIRECTIVE 2009/162/EU of 22 December 2009, OJ L 10, p. 14, COUNCIL DIRECTIVE 2010/23/EU of 16 March 2010, OJ L 72, p. 1, COUNCIL DIRECTIVE 2010/45/EU of 13 July 2010, OJ L 189, p. 1, COUNCIL DIRECTIVE 2010/88/EU of 7 December 2010, OJ L 326, p. 1, COUNCIL DIRECTIVE 2013/42/EU of 22 July 2013, OJ L 201, p. 1, COUNCIL DIRECTIVE 2013/43/EU of 22 July 2013, OJ L 201, p. 4, COUNCIL DIRECTIVE 2013/61/EU of 17 December 2013, OJ L 353, p. 5, COUNCIL DIRECTIVE (EU) 2016/856 of 25 May 2016, OJ L 142, p. 12, COUNCIL DIRECTIVE (EU) 2016/1065 of 27 June 2016, OJ L 177, p. 9, COUNCIL DIRECTIVE (EU) 2018/1910 of 4 December 2018, OJ L 311, p. 3, Council Directive (EU) 2017/2455 of 5 December 2017, OJ L 348, 29.12.2017, p. 7–22, ACT concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ L 112, p. 21 dated 24.4.2012 and corrected by Corrigendum, OJ L 335, 20.12.2007, p. 60 (2006/112/EC) and Corrigendum, OJ L 249, 14.9.2012, p. 15 (2006/112/EC).

[30] Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, OJ L 44, 20 February 2008, p. 23–28.

[31] Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes - Arrangements for the refund of value added tax to taxable persons not established in Community territory OJ L 326, 21 November 1986, p. 40–41.

[32] Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods, OJ L 292, 10

- The Directive on private consignments,[33]
- The Directive on Travellers' allowances,[34]
- The VAT regulation,[35] and
- The VAT Implementation Regulation.[36]

The emphasis of this research will be on determining the VAT treatment of vouchers, for which I will also have to determine whether a supply is made for consideration, whether a multiple-element supply should be 'bundled' into one, whether a multiple-element supply is composite supply or not, what the VAT treatment is of supplies made for no consideration and what the VAT treatment is of barter transactions, raffles and other games of chance. All these issues are mainly dealt with in the EU VAT Directive. Therefore, the EU VAT Directive will be my main source of written positive law. In examining the VAT treatment of a transaction based on the current EU VAT Directive, I will in some cases also examine the relevant provisions of its 'predecessors': the Sixth VAT Directive,[37] the Second Directive[38] and the First Directive,[39] mainly examining the published explanatory notes to these Directives.

The EU VAT Directive is part of Secondary EU Law. Secondary EU Law consists of legal instruments based on Primary EU Law and produced by supranational bodies that are created through this Primary EU Law. For VAT purposes, the most relevant sources of Primary EU Law are the Treaty on the Functioning of the European Union (TFEU)[40] and the Charter of Fundamental Rights of the European Union.[41] The most relevant

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November 2009, p. 5–30, as amended by Council Directive (EU) 2017/2455 of 5 December 2017, OJ L 348, 29.12.2017, p. 7–22.

[33] Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries (codified version), OJ L 286, 17 October 2006, p. 15–18.

[34] Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries, OJ L 346, 29 December 2007, p. 6–12.

[35] Commission Implementing Regulation (EU) No 904/2010, OJ L 311, p. 1 as amended by Commission Implementing Regulation (EU) No 815/2012 of 13 September 2012, OJ L 249, 14.9.2012, p. 3–10, Commission Implementing Regulation (EU) No 79/2012 of 31 January 2012, OJ L 29, 1.2.2012 and Council Regulation (EU) 2018/1909 of 4 December 2018, OJ L 311, p.1.

[36] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011, OJ L 77, 23.3.2011, p. 1–22, as amended by Council Regulation (EU) No 967/2012 of 9 October 2012, OJ L 290, 20.10.2012, p. 1 and COUNCIL IMPLEMENTING REGULATION (EU) 2018/1912 of 4 December 2018, OJ L 311, p. 10.

[37] Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment, OJ L 145 of 13 June 1977.

[38] Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax, OJ 71, 14 April 1967, p. 1303–1312, English special edition: Series I Volume 1967 P. 16 – 23.

[39] First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, OJ 71, 14 April 1967, p. 1301–1303.

[40] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, p. 47–390.

[41] Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, p. 391–407.

supranational bodies (from a VAT perspective) are the European Council, the European Commission, the European Parliament and the Court of Justice of the European Union (CJEU).[42]

Other sources of EU VAT law are CJEU case law (jurisprudence), Explanatory notes from the European Commission, VAT Committee Guidelines and European Commission Communications.[43]

I will test this positive law to norms that are derived from and based on the basic principles of EU VAT and the basic features of VAT (including the legal character of the EU VAT). I will use theoretical sources to substantiate my findings and views, such as international fiscal literature as well as written law and jurisprudence from local jurisdictions (mostly EU Member States, focussing on the Netherlands and the UK).

For this research, or any research regarding VAT, it is relevant to determine the purpose, or guiding principles, of VAT. Establishing this purpose is relevant because every provision of Union law must be interpreted in the light of the provisions of Union law as a whole, regard being had to the objectives thereof.[44]

Only after establishing the purpose of VAT, it becomes possible to determine whether certain provisions, proposals for adjustments to provisions and new provisions, and case law are in line with that purpose. If current rules, case law or practices are not in line with this purpose, alternatives should be in line with the purpose of VAT. If legislation or case law is not entirely clear, it should be explained and applied so that it is in line with the purpose of VAT. Also, if national VAT legislation is not in line with EU VAT law, national courts should apply the national legislation insofar as compatible with EU law.[45] However, Member States are not allowed to introduce VAT provisions that deviate from the EU VAT rules, even if these provisions better reflect the purpose of the EU VAT system.[46]

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42 A.J. van Doesum, H.W.M. van Kesteren, G.J. van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 20.

43 For a concise explanation of these sources, see A.J. van Doesum, H.W.M. van Kesteren, G.J. van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 17-19.

44 B. Terra and J. Kajus, A Guide to the European VAT Directives 2018, Volume 1, section 6.3.5. (The teleological interpretation method), IBFD 2010. See also, for example, CJEU Cases C-327/94, Jürgen Dudda v Finanzgericht Bergisch Gladbach, ECLI:EU:C:1996:355, paragraph 22 and C-255/02, Halifax plc and others v Commissioners of Customs & Excise ECLI:EU:C:2006:121, paragraph 74.

45 For example, see A-G Kokott's opinion in CJEU case C-594/10, T.G. van Laarhoven v Staatssecretaris van Financiën ECLI:EU:C:2012:92, paragraph 52.

46 See CJEU cases C-165/88 ORO Amsterdam Beheer BV and Concerto BV and Inspecteur der Omzetbelasting, ECLI:EU:C:1989:608, paragraphs 16, 22, 23 and 24 and C-338/98, Commission of the European Communities v Kingdom of the Netherlands, ECLI:EU:C:2001:596, paragraphs 55 and 56.

How can the purpose of VAT be established? Clues can be found in the EU VAT Directives and the various proposals for EU VAT Directives, including their explanatory notes, in various other documents from the European Commission, in rulings from the CJEU and in literature. This accounts for positive law and literature. Also, the fundamental principles underlying the EU VAT system and the characteristics of EU VAT can be useful for establishing the purpose of the EU VAT. I will first describe the EU VAT system as it is now (positive law) and after that look into the fundamental principles and the characteristics of EU VAT to establish what can be used as a test of this positive law and for establishing desired or appropriate law.

2.2 The current EU VAT system (positive law)

2.2.1 The early beginnings of EU VAT

In 1957, the European Community was founded and the Treaty of Rome was signed by all joining Member States, which at the time were France, Italy, Germany, The Netherlands, Belgium and Luxembourg.[47] According to the preamble to the Treaty of Rome, the Member States affirm as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples, and recognise that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition.

In order to guarantee balanced trade and fair competition, the Treaty of Rome, (in Part Three, Title I, "Common Rules") includes Tax Provisions (Chapter 2, page 80). The Articles included in this chapter concern the national tax rules and regulations and the harmonisation of national legislations. Article 99 reads as follows:

"The Commission shall consider how the legislation of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation, including countervailing measures applicable to trade between Member States, can be harmonised in the interest of the common market.

The Commission shall submit proposals to the Council, which shall act unanimously without prejudice to the provisions of Articles 100 and 101."

Before the EEC Commission drafted a proposal-Directive based on its mandate provided for in Article 99, it gathered advice from one of the three working groups it had appointed. Working group I, charged with the task of researching the possibilities of harmonising turnover taxes in the EEC Commission, appointed three subgroups (A, B and C) for this purpose. Their studies resulted in a report (the ABC-report).[48] In the

[47] Treaty establishing the European Economic Community, 25 March 1957, Rome (not published in the Official Journal).

[48] This report was published in English translation with the Neumark report (see below) as The EEC Reports on Tax Harmonisation – The Report of the Fiscal and Financial Committee and the Report of the Sub-Groups A, B and C (Amsterdam: IBFD Publications, 1963).

general introduction to the ABC-report, the EEC Commission mentions four principal disadvantages of the diversity of turnover tax legislation:

- the difficulty of the application of average rates foreshadowed under Art. 97;[49]
- the encouragement of vertical integration (integration) of enterprises inherent in a multi stage cumulative ("cascade") system of turnover taxes;
- the barriers to the free circulation of goods caused by the maintenance of tax frontiers, and
- the complications in relation to international trade which stem from the multiplicity of tax systems.

The EEC Commission also commissioned a study by the Fiscal and Financial Committee, which it had appointed in 1960 to study the extent to which the tax systems of the Member States conflicted with the establishment of a common market. This study resulted in the 'Neumark-report',[50] called after its Chairman and General Reporter, Prof. Dr. Dr. h.c. Dr. h.c. Fritz Neumark.

Even though the ABC-report does not come to any (clear) conclusion, one can read in it that a tax on the added value is considered most suitable to function as a common system of taxation in the EEC. The Neumark-report positively recommends this system. The recommendation to adopt the value added tax is by some seen as a rather audacious one, since the tax only existed in one of the Member States (France).[51] The Commission however, in a draft Directive,[52] in 1962 proposed this system as the common system for the EEC.

The Commission recognises as an essential prerequisite for the aim of the Treaty, which is to create an economic union based on vigorous competition and having the characteristics of an internal market, that the turnover tax legislation of Member States should not distort competition nor hinder the free circulation of goods and services in the Common Market.[53] It is in the interest of the Common Market to harmonize turnover tax in order to eliminate as far as possible all distortions in the

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[49] Based on Art. 97 of the original Treaty establishing the European Economic Community, Member States which levy a turnover tax based on the cumulative multi-stage tax systeem may, in the case of internal taxation imposed by them on imported products or of repayments allowed by them on exported products, establish average rates for products or groups of products, provided that there is no infringement of the principles laid down in Articles 95 and 96. In practice, establishing these average met with some difficulties. The result of this could be that relations are disturbed/disrupted.

[50] See the Neumark report, published in English translation with the ABC-report (see above) as The EEC Reports on Tax Harmonisation – The Report of the Fiscal and Financial Committee and the Report of the Sub-Groups A, B and C (Amsterdam: IBFD Publications, 1963).

[51] B.J.M. Terra, P.J. Wattel, European Tax Law (Student edition), Kluwer (Deventer) 2008 (Fifth edition), page 116.

[52] Proposal for a Council Directive for the harmonization amongst Member States of turnover tax legislation (IV/COM(62) 217 final, of 31 October 1962).

[53] Second recital in the preamble to the First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC), OJ 71, 14 April 1967, p. 1301–1303.

terms of competition, both nationally and at Union level. For this purpose, multi-stage, cumulative taxation should be abolished, as this is not a system that is neutral in its effects on competition. Also, the legislation in the Member States permitted the application of countervailing charges to imports and drawbacks on exports, thus maintaining tax frontiers between Member States. The Commission considered it is evident that harmonization must therefore culminate in the abolition of multi-stage, cumulative tax systems and the adoption by all Member States of a common system of added-value tax.

2.2.2 A Common System of Value Added Tax

The choice was made in favour of the system of value added tax since, in contrast to cumulative systems, neither competition[54] nor the free movement of goods and services within the common market[55] are distorted in this system.

In the view of the Commission, a value added tax system attains maximum simplicity and neutrality if the tax is levied as generally as possible and if the system embraces all stages of production and marketing, and also the services sector, and it is therefore in the interest of the Member States and of the Common Market to adopt as its common system a value added tax which extends to retail trade.

The Commission proposed that harmonisation should proceed in three stages. First, Member States should abandon their multi-stage cumulative turnover taxes and replace them by a non-cumulative system of their choice. After that, these non-cumulative systems of choice should be replaced by a common value added tax system. The third stage should result in the abolition of intra-Community tax frontiers. For various reasons the European Parliament considered that there should be only one initial phase, instead of the suggested two, during which all Member States would introduce the common value added tax system. The Commission accepted this objection, and it subsequently submitted two (revised) draft Directives to the Council of Ministers.[56]

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54 "Whereas the attainment of this objective presupposes the prior application in Member States of legislation concerning turnover taxes such as will not distort conditions of competition or hinder the free movement of goods and services within the common market", Second recital in the preamble to the First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC), OJ 71, 14 April 1967, p. 1301–1303.

55 "Whereas the replacement of the cumulative multi-stage tax system in force in the majority of Member States by the common system of value added tax is bound, even if the rates and exemptions are not harmonised at the same time, to result in neutrality in competition, in that within each country similar goods bear the same tax burden, whatever the length of the production and distribution chain, and that in international trade the amount of the tax burden borne by goods is known so that an exact equalisation of that amount may be ensured", Eighth recital in the preamble to the First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC), OJ 71, 14 April 1967, p. 1301–1303.

56 Amended proposal for a First Council Directive, submitted by the Commission to the Council on 12 June 1964 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC), and Second Council Directive of

The First Directive of 11 April 1967,[57] together with the Second Directive of the same date,[58] instructed the Member States to replace the existing turnover tax systems with a "common system of value added tax". This common system is described in Article 2 of the First Directive in the following terms:

"The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.

The common system of value added tax shall be applied up to and including the retail trade stage. (...)"

The above definition sets out the essential characteristics of a theoretical model to which the actual Union system aspires.[59,60] In all stages of production and distribution, tax is levied on all goods and services.

Although it is the purpose to tax only private consumption (through taxing private expenditure), the tax is collected by businesses and is also charged on expenditure by businesses. In principle, multiple taxation is avoided by allowing businesses to deduct the tax incurred on their purchases from the tax payable, i.e. the tax they collect from their customers. This system ensures that, regardless of the length of the production and distribution chain, the tax burden at any given moment is always equal to the tax charged by the last supplier. Therefore, the tax is borne only by the final consumer who, as he is not a taxable person, cannot deduct the tax.

The actual system of value added tax was set out in the Second Directive,[61] which determined what transactions were subject to the tax, gave definitions for the

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11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (67/228/EEC).

57 First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, OJ 71, 14 April 1967, p. 1301–1303.

58 Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax, OJ 71, 14 April 1967, p. 1303–1312, English special edition: Series I Volume 1967 p. 16 – 23.

59 See also Article 4, first paragraph, of the First Directive.

60 See: P. Farmer and R. Lyal, EC Tax Law, Oxford, 1994, p. 85.

61 Second Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (67/228/EEC), O.J. 71.

expressions ‘territory of the country’, ‘taxable person’, ‘supply of goods’ and ‘provision of services’ and provided rules for determining the place of these taxable transactions. The Second Directive also included a definition of the basis of assessment (the taxable amount). Member States were free to establish their own standard rate of tax and to subject certain goods and services to increased or reduced rates. Imported goods should be taxed at the same rate as that applied internally to the supply of goods. Also, subject to consultation, the Member States were free to determine their own exemptions. In principle, a taxable person was authorized to deduct from the tax for which he is liable the value added tax invoiced to him in respect of his purchases and imports, where these goods and services were used for the purposes of his business. He was required to keep sufficiently detailed accounts and to issue invoices in respect of goods and services supplied by him to another taxable person. Some other specific measures were introduced as well.

The system established by the First and Second Directives fell short of the model described in Article 2 of the First Directive (see above). Member States could choose not to apply the VAT at the retail stage, only services listed in Annex B to the Second Directive were compulsorily subject to VAT, Member States were free to determine their own exemptions and within limits Member States could restrict or refuse deduction in respect of capital goods.[62]

2.2.3 The Own Resources Decision and the Sixth Directive

A substantial incentive for further harmonisation of the common VAT system came from the Council’s Decision of 21 April 1970.[63] This Decision entailed that from an agreed date, the budget of the Communities would be financed entirely from the Communities’ ‘own resources’. These own resources were to also include those accruing from the value added tax, obtained by applying a specific rate to an assessment basis, which is determined in a uniform manner for Member States according to Union rules.[64]

This uniformly determined assessment basis was first introduced in the Sixth Directive, officially called the ‘Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment’. This Directive replaced the Second Directive. It must, however, be noted that from the preambles to the Sixth Directive it is clear that there were other reasons for drafting this Directive as well. In these preambles it is stated that progress should be made in the effective removal of restrictions on the movement of goods and services and the integration of national economies and it should be ensured that the common system of turnover taxes is non-discriminatory as

62 Art. 17 of the Second Directive includes most of these derogations from the main system, as a transitional measure.

63 70/243/ECSC, EEC, Euratom: Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, Official Journal L 094 , 28/04/1970 p. 19-22

64 See Article 4 of Council Decision 70/243/ECSC, EEC, Euratom.

regards the origin of goods and services, so that a common market permitting fair competition and resembling a real internal market may ultimately be achieved.[65]

The Sixth Directive took away some of the shortcomings of the Second Directive as mentioned above. It broadened the basis of assessment by removing the option for Member States to exclude the retail stage from the scope of the tax and by including all services in the scope of taxation. The Sixth Directive also provided for a list of exemptions and established rules for the taxation of transactions regarding immovable property and financial services. The Directive also introduced detailed rules for determining the place where transactions are deemed to be provided and special schemes were introduced for small undertakings, farmers and travel agents. By introducing these detailed provisions, the Sixth Directive introduced a method for determining a uniform basis of assessment.

2.2.4 The current EU VAT Directive

The current EU VAT Directive[66] replaced the Sixth Directive from 1 January 2007.[67] There were various reasons for this new Directive. The Sixth Directive had been significantly amended on several occasions, and with more amendments being made, it was deemed desirable, for reasons of clarity and rationalisation that the Sixth Directive should be recast.[68]

Another reason for the new EU VAT Directive was ensuring that the provisions are presented in a clear and rational manner, consistent with the principle of better regulation. The EU legislator deemed it appropriate to recast the structure and the wording of the Sixth Directive. This recasting exercise was said to not, in principle, bring about material changes in the existing legislation. A small number of substantive amendments were however inherent to the recasting exercise.[69]

Major material changes were made to the EU VAT Directive in 2008, mainly changing the rules for determining the place of supply of services.[70] For this research, it is

65 See also Working Document 360/73 of 14 February 1974, Report drawn up on behalf of the Committee on Budgets on the proposal from the Commission of the European Communities to the Council (Doc. 144/73) for a sixth directive on the harmonisation of the legislations of the Member States concerning taxes – common system of value added tax: uniform basis of assessment, P.E. 35.687 fin (Rapporteur: Mr. Harry Notenboom), p. 34.

66 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 December 2006, p. 1–118.

67 See Article 413 of the EU VAT Directive.

68 See the First Recital of the Preambles to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 December 2006, p. 1–118.

69 See the Third Recital of the Preambles to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 December 2006, p. 1–118.

70 Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services [2008] OJ L44/1.

relevant to mention another material change that has taken effect on 1 January 2019: from that date, specific rules with regard to the VAT treatment of transactions involving vouchers are included in the EU VAT Directive.[71]

I have above described the sources of positive EU VAT Law. I will now describe the fundamental principles underlying the EU VAT system and the characteristics of the EU VAT system as tests to establish whether the application of this positive law on promotional activities is in line with these principles and character, and whether there are differences between positive law and desired or appropriate law.

2.3 The fundamental principles underlying the EU VAT system

Union law, and the VAT Directives as part thereof, is founded on a number of principles. Some of these principles, such as the principle of an open market economy, are included in the EC Treaty.[72] Others, such as the neutrality principle, are mentioned in the European VAT Directives. These principles of Union law are in fact its foundation. When applying or interpreting Union law and legal concepts, which do not necessarily have the same meaning as in the national legislation of the Member States, every provision must be places in its context and interpreted in the light of the provisions of Union law as a whole, regard being held to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[73] The objectives of Union law are defined by their underlying principles. Therefore, these principles of Union law must be closely adhered to.

In this research, I will determine whether the methods of determining the VAT treatment of promotional activities in general, and transactions involving vouchers in particular, whether in the VAT Directives or case law, are in line with the relevant principles. Where they are not, I will suggest other methods, which are more in line with the relevant principles of Union law. For this purpose, I will have to determine which principles of Union law are relevant for this research.

2.3.1 The principle of neutrality

Neutrality is one of the most important, leading principles in value added tax. From the preamble to the First Directive, it is clear that the EU's common system of value added taxation aims to achieve, amongst other things, the highest form of neutrality. This neutrality is not defined anywhere in the VAT directive. A specific type of neutrality, neutrality in competition, is mentioned in the First Directive. It is described as meaning that within each country similar goods bear the same tax burden, whatever the length of the production and distribution chain, and that in international trade the amount of

[71] Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ L 177, 1.7.2016, p. 9–12.

[72] Consolidated version of the Treaty on European Union, OJ C 202, 7 June 2016, p. 13-46.

[73] CJEU Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, ECLI:EU:C:1982:335.

the tax burden borne by goods is known so that an exact equalisation of that amount may be ensured.[74] The CJEU describes fiscal neutrality as the principle under which economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT.[75] This means that there are two aspects to the concept of 'neutrality'.

First, the neutrality principle entails that VAT should be exactly proportional to the price of the goods and services.[76] This aspect is therefore sometimes referred to as the principle of 'system neutrality', because it is closely related to the purpose and the design of the EU VAT system.[77] System neutrality also means that VAT should not cascade (no VAT on VAT) throughout the supply chain and that double taxation or non-taxation must not occur. After all, if VAT cascades in the supply chain, or if double or non-taxation occurs, VAT will no longer be exactly proportional to the prices and likely have an effect on business decisions.[78]

Secondly, the neutrality principle in VAT reflects the (general) principle of equal treatment.[79] It forms a special manifestation of an overall EU law principle.[80] It is applicable in respect of similar services and goods which are (thus) in competition with each other.[81] According to settled CJEU case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes.[82]

Even though the CJEU considers the principle of neutrality as a 'fundamental principle of the common system of VAT established by the relevant Union legislation',[83] it is not

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74 See the 5th and the 8th recital in the preamble to the First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, OJ 71, 14 April 1967, p. 1301–1303, now included in the 5th and 7th recital in the preamble to the EU VAT Directive, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 11.12.2006, L 347/1.

75 CJEU case C-382/02, Cimber Air A/S v Skatteministeriet, ECLI:EU:C:2004:534, paragraph 4.

76 This is referred to as 'the principle of the common system of VAT' in Article 1(2) of the EU VAT Directive.

77 Cf. A.H. Bomer, De doorwerking van algemene rechtsbeginselen in de BTW (dissertation) (Kluwer 2012).

78 A.J. van Doesum, H.W.M. van Kesteren, G.J. van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 37.

79 See, for example, CJEU case C-259/10, Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc, ECLI:EU:C:2011:719 , paragraph 32.

80 A.J. van Doesum, H.W.M. van Kesteren, G.J. van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 37.

81 See, for example, CJEU case C-259/10, Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc, ECLI:EU:C:2011:719 , paragraph 32 and the case law cited there.

82 CJEU case C-309/06, Marks & Spencer plc v Commissioners of Customs & Excise, ECLI:EU:C:2008:211, paragraph 49.

83 CJEU case C-454/98, Schmeink & Cofreth AG & Co. KG v. Finanzamt Borken and Manfred Strobel v. Finanzamt Esslingen, ECLI:EU:C:2000:469, paragraph 59.

a rule of primary law.[84] It is merely a principle of interpretation, to be applied concurrently with other principles of interpretation.

Neutrality, as a fundamental principle underlying the EU VAT system, is a relevant test for determining whether positive (written) law is in line with appropriate or desired law.

2.3.2 The principle of legal certainty

The principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application be foreseeable by those subject to them.[85] It requires that EU rules enable those concerned to know unequivocally the extent of their rights and obligations so that they are in a position to order their affairs with the benefit of full information.[86] The principle of legal certainty also requires the tax position of the taxable person, in the light of his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely.[87]

Legal documents such as contracts normally reflect the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when determining the VAT treatment of an agreed transaction.[88] As regards in particular the importance of contractual terms in determining the VAT treatment of a transaction, it is necessary to bear in mind the case-law of the CJEU according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT.[89] This means that even though contractual terms constitute a factor to be taken into consideration, are not decisive for determining the VAT treatment of a transaction. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to

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84 CJEU case C-44/11, Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG, ECLI:EU:C:2012:484, paragraph 45.

85 See, for example, CJEU cases C-396/16, C-396/16, T-2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o. (sedaj v stečaju) v Republika Slovenija, ECLI:EU:C:2018:109, parapraph 52 and C-492/13, Traum EOOD v Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECLI:EU:C:2014:2267, paragraph 28.

86 See, for example, CJEU cases C-390/15, Rzecznik Praw Obywatelskich (RPO) v Marszałek Sejmu Rzeczypospolitej Polskiej, Prokurator Generalny, ECLI:EU:C:2017:174, paragraph 59 and C-582/08, European Commission v United Kingdom of Great Britain and Northern Ireland, ECLI:EU:C:2010:429, paragraph 49.

87 See, for example, CJEU case C-81/17, Zabrus Siret SRL v Direcţia Generală Regională a Finanţelor Publice Iaşi - Administraţia Judeţeană a Finanţelor Publice Suceava, ECLI:EU:C:2018:283, paragraph 38.

88 CJEU case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409, paragraph 43.

89 CJEU case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409, paragraph 42.

determine. This means that in certain cases, 'economic reality' can be more relevant than legal certainty. I will therefore examine the concept of 'economic reality' as a possible test for positive law in Section 2.5.

Other examples of principles underlying the EU VAT system are the principle of proportionality, the principle of prohibiting abusive practices and the principle of prohibiting tax fraud.[90] These principles are not relevant for this research, and therefore I will not elaborate on them.

2.4 The basic features and character of the EU VAT system

The nature or character is a basic feature of the EU VAT. The character of any piece of positive written law defines the purpose of that law. The character of the EU VAT system defines the purpose of the EU VAT system. The purpose provides an answer to the questions what should be taxed (the object of the tax) and who should be taxed (the tax subject).[91]

2.4.1 VAT: a tax on consumption

Art. 1 of the EU VAT Directive states: "The principle of the common system of VAT entails the application to goods and services of a general tax on consumption (…)". Therefore, one may assume that VAT intends to tax consumption.[92,93] Various other provisions in the EU VAT Directive support this assumption. Examples are:

- the so-called 'margin scheme'[94] under which the supply of certain goods that have already been (partially) used/consumed, such as second-hand goods and works of art, is not always taxed on the full price when (re)sold; and
- the provisions that provide for certain forms of private use to be subject to VAT even when not performed for consideration;[95] and
- the provisions that establish that the 'transfer of a going concern', where no consumption takes place, is not considered a taxable transaction.[96]

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90 A.J. van Doesum, H.W.M. van Kesteren, G.J. van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 35.

91 S.B. Cornielje, Fusies en overnames in de Europese btw, Fiscale Monografieën 146, Wolters Kluwer (Netherlands) 2016, p. 40.

92 From an economic standpoint, turnover tax represents a tax on consumption that is consequently transferred to the consumer: The EEC Reports on Tax Harmonization, The report of The Fiscal and Financial Committee and The Reports of the Sub-Groups A, B and C, IBFD, Amsterdam 1963, second edition (1969), p. 25.

93 See, for example, Sybren Cnossen, "A Primer on VAT as Perceived by Lawyers, Economists and Accountants", in: Value Added Tax and Direct Taxation: similarities and differences by Michael Lang et al., IBFD, Amsterdam 2009, p. 141.

94 See Artt. 311-341 of the EU VAT Directive.

95 See Artt. 16 and 26 of the EU VAT Directive.

96 See Artt. 19 and 29 of the EU VAT Directive.

The CJEU has repeatedly confirmed that VAT is a tax on consumption.[97] Also, in literature, authors often qualify VAT as a tax on consumption.[98] Van Doesum refers to this as the 'legal character of VAT'.[99] He refers to the method of achieving the taxation of consumption, i.e. by applying the VAT generally to transactions relating to goods or services and is charged at each stage of the production and distribution process, as 'the general, objective character of VAT'.[100] In the OECD's International VAT/GST Guidelines, the 'overarching purpose of a VAT' is defined as 'a broad based tax on final consumption' and the 'central design feature of a VAT' is the staged collection process.[101]

2.4.2 VAT: a tax on consumer expenditure

However, there is a compelling argument for VAT not being a tax on consumption as such: the way that the taxable amount is determined.[102] Article 1 of the EU VAT Directive states that VAT is "(…) a general tax on consumption exactly proportional to the price of the goods and services (…)". In a 'true' consumption tax, where the actual individual consumption is the relevant indicator for taxation, one would expect consumption of similar goods and services to be taxed based the objective value of the consumed goods rather than the price that parties are prepared and have agreed to pay for these goods or services.[103]

In the first proposal for a Sixth Directive,[104] the taxable amount for transactions where the consideration was not (solely) a sum of money was the 'open market value' of the subject of the supply. Prima facie, this looks like another argument for considering the EU VAT something different from 'a general tax on consumption'. However, using the open market value as a taxable amount was proposed because the Commission sought

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97 See, for example, CJEU cases C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, paragraph 19 et seq., C-475/03, Banca popolare di Cremona Soc. Coop. arl v. Agenzia Entrate Ufficio Cremona, ECLI:EU:C:2006:629, paragraph 31 et seq. and C-371/07, Danfoss A/S and AstraZeneca A/S/v. Skatteministeriet, ECLI:EU:C:2008:711, paragraphs 46 et seq.

98 See, for example, Alan Schenk and Oliver Oldman, Value Added Tax: a comparative approach, Cambridge University Press 2007, p. 33 and 64, Liam Ebril et al., The Modern VAT, International Monetary Fund 2001, p. 23, and Gert-Jan van Norden, Het concern in de btw, Kluwer, Deventer, p. 21 et seq.

99 A.J. van Doesum, Contributions to Partnerships from a European VAT Law Perspective, (2010) 19 EC Tax Review, Issue 6, pp. 259–271.

100 A.J. van Doesum, Contributions to Partnerships from a European VAT Law Perspective, (2010) 19 EC Tax Review, Issue 6, pp. 259–271.

101 OECD (2017), International VAT/GST Guidelines, OECD publishing, Paris, pp. 14-15.

102 The concept elaborated on in this subsection is loosely based on the views of Joachim Englisch as described in his paper "VAT/GST and Direct Taxes: Different Purposes" in: Value Added Tax and Direct Taxation: similarities and differences by Michael Lang et al., IBFD, Amsterdam 2009, p. 1 et seq.

103 Joachim Englisch, "VAT/GST and Direct Taxes: Different Purposes" in: Value Added Tax and Direct Taxation: similarities and differences by Michael Lang et al., IBFD, Amsterdam 2009, p. 27.

104 Proposal for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950 of 20 June 1973, Bulletin of the European Communities 1973, Supplement 11/73, OJ C 80, 5 October 1973, p. 1.

to put domestic transactions and importations on the same footing as regards the taxable amount and not because the Commission wished the amount to be in line with the purpose of VAT.[105] This part of the proposal was abandoned in the amended proposal and the final version of the Sixth Directive, for various reasons that did not have anything to do with the purpose of VAT.[106]

Another way of establishing the purpose of VAT is by examining the CJEU case law on the provision that precludes Member States to introduce or maintain taxes that qualify

105 "(…) it has been sought to put domestic transactions and importations on the same footing as regards the taxable amount, while endeavouring at the same time to retain the notion of 'customs value' for cases where the goods are subject to customs duties. Thus the expression 'open market value', which can apply both to domestic transactions and to importations, has been defined in such a way as to be virtually equivalent to 'customs value'. Moreover, as is the case with 'customs value', the notion of 'open market value' will apply to importations only in those exceptional cases in which there is no 'price paid or to be paid'." Explanatory Memorandum to the first proposal to a for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950 of 20 June 1973, Bulletin of the European Communities 1973, Supplement 11/73, OJ C 80, 5 October 1973, p. 1.

106 The Commission of the European Communities' Amendments to the proposal for a Sixth Council Directive on the harmonization of legislation of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, as presented by the Commission to the Council pursuant to the second paragraph of Article 149 of the EEC Treaty, COM(74) 795 final, Brussels, 26 July 1974, in which all relevant conclusions from the European Parliament, Working Documents (1973-1974), Document 360/73 of 14 February 1974, Report drawn up on behalf of the Committee on Budgets on the proposal from the Commission of the European Communities to the Council (Doc. 144/73) for a sixth directive on the harmonization of the legislation of the Member States concerning turnover taxes – common system of value added tax: uniform basis of assessment, also known as the Notenboom report, were included. The following reasons for not using the 'open market value' are mentioned: 'open market value' can only be applied if transactions take place under conditions of 'fair competition', it did nothing to clarify the Second Directive, it would be hard to distinguish subsidies and when an entrepreneur consumes his own goods or services in private it would seem fairer to base the taxable amount on the purchase price or costs price rather than on the open market value, for both practical and psychological reasons.

as a VAT.[107],[108] In one of these cases (the Bregandi case)[109] concerning this provision, the CJEU holds that this provision does not preclude a tax that "does not display the characteristics of a general tax on consumption levied on the price charged for the provision of services".

VAT therefore seems to be a tax on expenditure for consumption. As I mentioned before, it can be argued that the 'consumption' is a reflection of the legal character of the VAT, where the method of taxation, i.e. taxing expenditure, is a reflection of the general, objective character of VAT.

This raises questions about the provisions in the EU VAT Directive under which certain transactions, such as the application or use of business goods for private purposes and the movement of own goods to another country by a taxable person, without a payment being made for that application or transfer, are subject to VAT. If EU VAT is a tax on consumer expenditure, how can transactions for which no consideration is charged, be subject to VAT?

In case of the application or use for private purposes of business assets, the grounds for taxation can be found in the fact that private consumption takes place of goods

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107 Article 401 of the EU VAT Directive.

108 See, for example, CJEU cases 27-74, Demag AG v Finanzamt Duisburg-Süd, ECLI:EU:C:1974:104, 295/84, SA Rousseau Wilmot v Caisse de compensation de l'Organisation autonome nationale de l'industrie et du commerce (Organic), ECLI:EU:C:1985:473, 252/86, Gabriel Bergandi v Directeur général des impôts, ECLI:EU:C:1988:112, joined cases 93/88 and 94/88, Wisselink en Co. BV and others v Staatssecretaris van Financiën, ECLI:EU:C:1989:324, cases C-109/90, NV Giant v Gemeente Overijsel, ECLI:EU:C:1991:126, case C-200/90, Dansk Denkavit ApS and P. Poulsen Trading ApS, supported by Monsanto-Searle A/S v Skatteministeriet, ECLI:EU:C:1992:152, C-347/90, Aldo Bozzi v Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e dei Procuratori legali, ECLI:EU:C:1992:200, joined cases C-370/95, C-371/95 and C-372/95, Careda SA (C-370/95), Federación nacional de operadores de máquinas recreativas y de azar (Femara) (C-371/95) and Asociación española de empresarios de máquinas recreativas (Facomare) (C-372/95) v Administración General del Estado, ECLI:EU:C:1997:327, cases C-130/96, Fazenda Pública v Solisnor-Estaleiros Navais SA, also represented: Ministério Pùblico, ECLI:EU:C:1997:416, C-318/96, SPAR Österreichische Warenhandels AG v Finanzlandesdirektion für Salzburg, ECLI:EU:C:1998:70, joined cases C-338/97, C-344/97 and C-390/97, Erna Pelzl and Others v Steiermärkische Landesregierung (C-338/97), Wiener Städtische Allgemeine Versicherungs AG and Others v Tiroler Landesregierung (C-344/97) and STUAG Bau-Aktiengesellschaft v Kärntner Landesregierung (C-390/97), ECLI:EU:C:1999:285, cases C-308/01, GIL Insurance Ltd and Others v Commissioners of Customs & Excise, ECLI:EU:C:2004:252, C-387/01, Harald Weigel and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg, ECLI:EU:C:2004:256, joined cases C-283/06 and C-312/06, KÖGÁZ rt and Others v Zala Megyei Közigazgatási Hivatal Vezetője (C-283/06) and OTP Garancia Biztosító rt v Vas Megyei Közigazgatási Hivatal (C-312/06), ECLI:EU:C:2007:598, cases C-151/08, N.N. RENTA SA v Tribunal Económico-Administrativo Regional de Cataluña (TEARC) and Generalidad de Cataluña, ECLI:EU:C:2008:662, C-156/08, Monika Vollkommer v Finanzamt Hannover-Land I, ECLI:EU:C:2008:663, C-119/08, Mechel Nemunas UAB v Valstybinė mokesčių inspekcija prie Lietuvos respublikos finansų ministerijos, ECLI:EU:C:2009:53 and C-139/12, Caixa d'Estalvis i Pensions de Barcelona v Generalidad de Cataluña, ECLI:EU:C:2014:174.

109 CJEU Case 252/86, Gabriel Bregandi and Directeur Général des impôts, ECLI:EU:C:1988:112, par. 16.

and/or services for which expenditures have been made, although the expenditures were made by the taxable person acting as such. This taxable person will probably have deducted the VAT on the costs of these goods and/or services. In order to avoid untaxed consumption and to ensure neutrality (in the sense that similar transactions, in this case sales of goods and services that will be used for private consumption, are treated the same for VAT purposes), these transactions are treated as supplies of goods or services for consideration, and therefore subject to VAT.[110]

2.4.3 VAT: a general tax on expenditure for private consumption

At first glance, the fact that businesses, as a main rule, can deduct input VAT could suggest that this deduction system was introduced to ensure that only expenditure for private consumption is taxed. However, in my view, deduction of input tax is also a means of ensuring the neutrality of VAT.

One of the fundamental principles of VAT is the principle of neutrality.[111][112] Two levels of neutrality can be discerned: internal neutrality and external neutrality.[113] Internal neutrality, which is related to national aspects, can be divided into legal neutrality, competition neutrality and economic neutrality.[114] Legal neutrality means two things: it means that similar transactions should be treated the same (e.g. the same VAT rate or exemption should apply to the same transactions). Legal neutrality also means that the amount of VAT due on the same supply should be the same, irrespective of the length of/amount of transactions in the production and distribution chain before the supply to the final consumer. The right to deduct input VAT ensures the latter.[115,116] Therefore, the system of deduction of input VAT is in my view a means of ensuring neutrality. Be that as it may, the system of deduction of input VAT is such a paramount feature of the EU VAT system that one can hardly call the fact that this ensures that only private consumption is taxed, a 'side effect'. It is inherent to the EU VAT system. Also, Article 176 of the EU VAT Directive states that "(t)he Council, acting

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110 See Articles 16 and 26 of the EU VAT Directive. I will elaborate on the VAT consequences of supplies that are made for no consideration in Chapter 6.

111 See Section 2.3.1 of this Chapter.

112 Borbála Kolozs, Neutrality in VAT, in Value Added Tax and Direct Taxation: similarities and differences by Michael Lang et al., IBFD 2009, p. 201 et seq. and Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, Volume 1, section 7.3.

113 Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, Volume 1, section 7.3.

114 Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, Volume 1, section 7.3.

115 This is also one of the main reasons that the Commission decided to implement the current system of VAT, i.e. the system all links in the production and distribution chain charge VAT on their full price and deduct the VAT on their costs. See: The EEC Reports on Tax Harmonization, The report of The Fiscal and Financial Committee and The Reports of the Sub-Groups A, B and C, IBFD, Amsterdam 1963, second edition (1969), p. 71 et seq. and the fourth and fifth recital in the preamble to the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, Official Journal 1301/67, p. 14.

116 See Article 1, section 2, of the EU VAT Directive: "(…) On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components (…)".

unanimously on a proposal from the Commission, shall determine the expenditure in respect of which VAT shall not be deductible. VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment". Even though the Council never actually determined this expenditure, the examples that are given (luxuries, amusement or entertainment) make clear that the aim is to tax private consumption.

Other support for my view that taxation of private consumption is the purpose of the EU VAT system, can be found in CJEU case law. With regard to the provisions providing for the taxation of the application or use of business assets for non-business purposes,[117] the CJEU has made clear that only private consumption by individuals, not by legal entities, is within the scope of VAT.[118] It has also repeatedly stated that a taxable person must bear the burden of VAT only when it relates to goods or services, which he uses for private consumption and not for his taxable business activities.[119]

From the above it is, in my view, clear that the character of VAT is the taxation of expenditure for private consumption, or consumer expenditure.[120]

2.4.4 VAT: a tax on expenditure for local private consumption

External neutrality[121] ensures that goods and services produced and supplied locally have the same tax treatment as imported goods and services provided by businesses that are established in other countries.[122] It also means that, because VAT is meant to tax the expenditure of individual consumers, if goods are not consumed in the country of origin while at the same time tax is levied on these goods, a refund should be made when the goods are exported.[123] Under that same rationale, services should be taxed in the country of consumption.

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117 See Article 26(1)(b) of the EU VAT Directive.

118 CJEU cases C-20/91, Pieter de Jong and Staatssecretaris van Financiën, ECLI:EU:C:1992:192, paragraph 17 and C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, par. 33-40.

119 See, for example, CJEU cases C-291/92, Finanzamt Uelzen v Dieter Armbrecht, ECLI:EU:C:1995:304, paragraph 20 and C-25/03, Finanzamt Bergisch Gladbach v HE, ECLI:EU:C:2005:241, paragraph 48.

120 See, in the same sense, Paul Farmer and Richard Lyal, EC Tax Law, Clarendon Press, Oxford 1994, p. 85 and Joachim Englisch, "VAT/GST and Direct Taxes: Different Purposes" in Value Added Tax and Direct Taxation: similarities and differences by Michael Lang et al., IBFD 2009, p. 1 et seq. and Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, IBFD, 2018, Volume 1, section 7.3.2.

121 Cf. Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, IBFD, 2018, Volume 1, section 7.3.

122 See Section 2.3.1 of this Chapter.

123 This principle is embedded in Art. 96 of the Treaty establishing the European Economic Community, Traites 1957 CEE 1(EN) 0001, which was the basis for the VAT Directives, now Art. 91 of the Consolidated version of the Treaty of the European Union, OJ of 24 December 2002, C 325/68, which also states that any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

The European Commission, in the 'Green Paper' on the future of VAT[124] and the accompanying Working document[125] indicate that the VAT system is moving away from taxation based on the 'origin principle' towards taxation based on the 'destination principle', even though the opposite is stated in Art. 402 of the EU VAT Directive.[126] The OECD also adheres to the destination principle as one of the guiding principles for a VAT system.[127] Even under the 'origin principle', the VAT would have been paid to the treasury of the country of destination through a 'clearing-house system'.[128] Taxation under the destination principle to me implies that the purpose is to tax expenditure for local consumption, because that takes place at the place of destination.

This means that the purpose of a neutral VAT is to tax expenditure for local private consumption. This is consistent with the four essential characteristics of EU VAT that the CJEU has established in its jurisprudence on the prohibition of introducing or maintaining taxes that qualify as a VAT:[129]

- VAT applies generally to transactions relating to goods or services,
- it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied,
- that tax is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place, and
- the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that that tax applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately on the consumer.

2.5 The economic and commercial reality of a transaction

Above, when discussing the fundamental principles underlying the EU VAT system, and more specifically the principle of legal certainty, I mentioned that in certain cases,

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124 European Commission, Green Paper, On the future of VAT - Towards a simpler, more robust and efficient VAT system, Brussels, 1 December 2010, COM(2010) 695 final, page 7.

125 Commission Staff Working Document, Accompanying document to the Green Paper on the future of VAT - Towards a simpler, more robust and efficient VAT system, Brussels, 1 December 2010, SEC(2010) 1455 final, pages 4 and 11.

126 Article 402(1) of the EU VAT Directive states: The arrangements provided for in this Directive for the taxation of trade between Member States are transitional and shall be replaced by definitive arrangements based in principle on the taxation in the Member State of origin of the supply of goods or services.

127 OECD (2017), International VAT/GST Guidelines, OECD publishing, Paris, p. 15-17.

128 See, for example, Completing the Internal Market: White Paper from the European Commission to the European Council, Brussels, 14 June 1985, COM(85) 310 FINAL, paragraph 172 et seq.

129 See, for example, CJEU joined cases C-283/06 and C-312/06, KÖGÁZ rt and Others v Zala Megyei Közigazgatási Hivatal Vezetője (C-283/06) and OTP Garancia Biztosító rt v Vas Megyei Közigazgatási Hivatal (C-312/06), ECLI:EU:C:2007:598, paragraph 37.

'economic reality' can be more relevant than legal certainty. I will now examine the concept of 'economic reality'.
One of the criteria used by both the CJEU as well as national courts for deciding the appropriate VAT treatment of a transaction is the 'economic and commercial reality' of that transaction. What is economic and commercial reality?

In the dictionary, 'reality' is explained as "The state of things as they actually exist, as opposed to an idealistic or notional idea of them" or "Existence that is absolute, self-sufficient, or objective, and not subject to human decisions or conventions".[130] This means that reality should provide for an appropriate reference point where other aspects regarding a transaction, such as a legal agreement between the parties to the agreement, deviates from "reality". This leads to the next question: what is "economic" reality?

In the dictionary, 'economic' is defined as "Relating to economics or the economy".[131] 'Commercial" is defined as "Concerned with or engaged in commerce".[132] Looking at these definitions, 'economic and commercial reality' seems a reality that is based on the economy or commerce. This does not seem to make much sense as a test for qualifying a transaction in order to determine its VAT consequences. So, what does the CJEU mean by 'economic and commercial reality'?

The CJEU does not only use the concept of 'economic and commercial reality', but also (non-exhaustively): 'economic reality', 'commercial reality', the 'actual economic situation' and 'from an economic perspective'. In order to establish whether 'economic reality' can be a useful test for answering (some of) my research questions, I will first need to establish what this reality entails.

2.6 The CJEU's use of economic and/or commercial reality

The CJEU applies the concept of 'economic reality', 'commercial reality' and 'economic and commercial reality' for deciding cases that contain three main categories. The first category concerns cases where the CJEU provides criteria for determining whether the facts of a case should be qualified as 'abuse of law'. The second category concerns cases where the CJEU provides criteria for determining whether a supply that consists of multiple elements should be considered as the supply of those separate elements as such or as a single, composite supply. The third category concerns cases where the 'economic and commercial reality' of a transaction deviates from the 'legal reality' of

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130 English Oxford Living Dictionaries (Online: https://en.oxforddictionaries.com/definition/reality), search result for the word "reality", accessed on-line on 8 June 2018. © 2018 Oxford University Press.

131 English Oxford Living Dictionaries (Online: https://en.oxforddictionaries.com/definition/economic), search result for the word "economic", accessed on-line on 8 June 2018. © 2018 Oxford University Press.

132 English Oxford Living Dictionaries (Online: https://en.oxforddictionaries.com/definition/commercial), search result for the word "commercial", accessed on-line on 8 June 2018. © 2018 Oxford University Press.

that transaction (i.e. what parties to that transaction have legally agreed). In these cases, taxation is based on the economic and commercial reality of the transaction because using legal reality as a basis would not lead to 'appropriate taxation'. This can be considered as a 'substance over form' interpretation of the relevant transaction. I will briefly discuss these categories before looking into the remaining cases where the CJEU has used economic and/or commercial reality.

2.6.1 The principle of prohibition of abuse of law

The principle of prohibition of abuse of (Union) law is an integral part of the EU VAT system.[133] It is also included in some of the provisions of the EU VAT Directive.[134] The purpose and effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole (or principal) aim of obtaining a tax advantage.[135] The CJEU has, in cases where abuse of law ('fraus legis') could be an issue, used 'economic reality' as a test for determining whether the setup of the parties involved constituted an abusive practice.[136] The principle prohibiting the abuse of rights is intended to ensure, particularly in the field of VAT, that Union legislation is not extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Union law. The effect of that principle is therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage. This means that 'economic reality' is a reflection of 'transaction carried out in the context of normal commercial operations'. Where transactions that are carried out, do not reflect economic reality, this could be an indication that the transaction could possibly be an

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133 See, for example, CJEU cases C-110/99, Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas, ECLI:EU:C:2000:695, paragraph 51 and joined cases C-487/01 and C-7/02, Gemeente Leusden (C-487/01) and Holin Groep BV cs (C-7/02) v Staatssecretaris van Financiën, ECLI:EU:C:2004:263, paragraph 78.

134 See, for example, Articles 11, 19, 80, 131, 158 and 343 of the EU VAT Directive.

135 Literally from: A.J. van Doesum, H.W.M. van Kesteren, G.J. van Norden, Fundamentals of EU VAT law, Alphen aan den Rijn: Kluwer Law International, 2016, p. 39.

136 See, for example, CJEU cases C-162/07, Ampliscientifica Srl and Amplifin SpA v Ministero dell'Economia e delle Finanze and Agenzia delle Entrate, ECLI:EU:C:2008:301, paragraph 28, C-103/09, The Commissioners for Her Majesty's Revenue and Customs v Weald Leasing Ltd, ECLI:EU:C:2010:804, paragraph 39, C-277/09, The Commissioners for Her Majesty's Revenue & Customs v RBS Deutschland Holdings GmbH, ECLI:EU:C:2010:810, paragraph 51, C-504/10, Tanoarch s.r.o. v Daňové riaditeľstvo Slovenskej republiky, ECLI:EU:C:2011:707, paragraph 51, C-33/11, A Oy, ECLI:EU:C:2012:482, paragraph 63, C-326/11, J.J. Komen en Zonen Beheer Heerhugowaard BV v Staatssecretaris van Financiën, ECLI:EU:C:2012:461, paragraph 35, C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409, C-419/14, WebMindLicenses kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, ECLI:EU:C:2015:832, paragraph 35, C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392, paragraph 50 and C-251/16, Edward Cussens and Others v T. G. Brosman, ECLI:EU:C:2017:881, paragraph 61.

abusive practice. In most of its cases on this issue, the CJEU uses the term 'economic reality', in one case it only uses 'commercial reality'[137] and in one case it uses both terms for the same test.[138]

This leads me to the conclusion that for the purpose of determining whether a certain practice qualifies as abuse of law, which is therefore in breach of the principle that prohibits the abuse of law, 'economic reality' and 'commercial' reality mean the same. These realities are reflections of the actual, factual, transaction(s) in question. They provide an objective view of the transaction. Wholly artificial arrangements do not reflect economic reality. This also follows from the fact that the CJEU requires that the transactions between parties that are found to be involved in an abusive practice, must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.[139] In my view, that situation is what economic and/or commercial reality would or should have been without in absence of the 'abusive transactions'. This means that, in cases where the CJEU tests whether the transactions of the case qualify as an abusive practice, economic and/or commercial reality is a reflection of the way independent businesses would normally do business and design or set up their transactions.

2.6.2 Composite supplies

I will elaborate on the VAT consequences of composite supplies in Chapter 4 of this research. For this section, it is relevant to determine which criteria the CJEU applies for determining whether a supply consisting of multiple elements should, for VAT purposes, be treated as a supply of all the separate elements or rather as a single, composite, supply. For this purpose, the CJEU has not used the 'economic reality' as such, but it has used 'commercial reality' as a test.[140] In most cases about the VAT treatment of composite supplies, the CJEU uses the term 'from an economic point of view'.[141] Every supply must normally be regarded as distinct and independent but a

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137 CJEU case C-251/16, Edward Cussens and Others v T. G. Brosman, ECLI:EU:C:2017:881, paragraph 61.

138 CJEU case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409.

139 See, for example, CJEU case C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:121, paragraph 94.

140 See CJEU cases C-607/14, Bookit, Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2016:355 and C-130/15, Commissioners for Her Majesty's Revenue and Customs v National Exhibition Centre Limited, ECLI:EU:C:2016:357.

141 See, for example, CJEU cases C-349/96, Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise, ECLI:EU:C:1999:93, C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649, C-111/05, Aktiebolaget NN v Skatteverket, ECLI:EU:C:2007:195, C-453/05, Volker Ludwig v Finanzamt Luckenwalde, ECLI:EU:C:2007:369, C-242/08, Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften, ECLI:EU:C:2009:647, C-88/09, Graphic Procédé v Ministère du Budget, des Comptes publics et de la Fonction publique, ECLI:EU:C:2010:76, C-94/09, European Commission v French Republic, ECLI:EU:C:2010:253, C-276/09, Everything Everywhere Ltd v Commissioners for Her Majesty's Revenue and Customs , ECLI:EU:C:2010:730, joined cases C-497/09, C-499/09, C-501/09 and C-502/09, Finanzamt Burgdorf v

transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system.[142] The characteristic elements of the transaction concerned must be examined in order to determine whether the supplies constitute several distinct principal supplies or one single supply. This means that in my view, in cases where the CJEU tests whether the transactions of the case qualify as multiple, separate supplies or as a single, composite, supply, economic and/or commercial reality, or rather the 'economic point of view, is – amongst other things – a reflection of the way independent businesses would normally do business and design or set up their transactions.

In this cluster of CJEU case law, economic reality is assessed from the viewpoint of a 'typical consumer'. Where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split, that supply should be treated as a single (composite) supply.[143] Who is this 'typical consumer' that determines economic reality?

2.6.3 What is a 'typical consumer'?

In a number of its cases, the CJEU refers to the perception of a 'typical consumer' as a relevant factor in determining the VAT consequences of a multiple-element transaction as based on 'economic reality'.[144] In this respect, the CJEU has repeatedly stated that in order to determine whether a business is supplying the customer – envisaged as being a typical consumer (emphasis by me, JB) – with several distinct principal services or with a single service, the essential features of the transaction must be ascertained

Manfred Bog (C-497/09), CinemaxX Entertainment GmbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst (C-499/09), Lothar Lohmeyer v Finanzamt Minden (C-501/09) and Fleischerei Nier GmbH & Co. KG v Finanzamt Detmold (C-502/09), ECLI:EU:C:2011:135, cases C-117/11, Purple Parking Ltd and Airparks Services Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2012:29, C-224/11, BG*Ż* Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie, ECLI:EU:C:2013:15, C-392/11, Field Fisher Waterhouse LLP v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2012:597, C-42/14, Minister Finansów v Wojskowa Agencja Mieszkaniowa w Warszawie, ECLI:EU:C:2015:229 and C-463/16, Stadion Amsterdam CV v Staatssecretaris van Financiën, ECLI:EU:C:2018:22.

142 See, for example, CJEU case C-392/11, Field Fisher Waterhouse LLP v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2012:597, paragraph 18.

143 CJEU case C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649, par. 22.

144 See, for example, Cases C-18/12, Město Žamberk v Finanční ředitelství v Hradci Králové, ECLI:EU:C:2013:95, par. 30 and 33, C-41/04, Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649, par. 20 and 22 and C-276/09, Everything Everywhere Ltd, formerly T-Mobile (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:730, par. 26.

and regard must be had to all the circumstances in which that transaction takes place.[145]

The term 'typical consumer' is not explained or defined by the CJEU in any of the cases where it is used for determining the VAT consequences of a multiple-element transaction.[146] In the dictionary, synonyms for 'typical' are 'normal', 'average', 'ordinary', 'standard' and 'regular'.[147] The term 'average consumer' is also used by the CJEU in other case law, mostly for determining whether, for the application of the principle of fiscal neutrality (as in: treating similar transactions the same from a VAT perspective), transactions are sufficiently 'similar'.[148] According to the CJEU, for the latter purpose, as the average consumer's assessment is liable to vary according to different factors that are specific to each national market, it is the average consumer in each Member State who must be taken as a reference. In my opinion, this is similar to 'typical consumers' whose views are relevant for determining the VAT consequences of multiple-element supplies, because an approach based on 'economic reality' can be similar to a means of prevention of distortion of competition, in the sense that they are both reflections of the principle of neutrality, as I will explain in Section 2.6.4.1. Neutrality dictates that (sufficiently) similar transactions are treated the same for VAT purposes, and economic reality can be used to assess whether transactions are similar.

In summary, the 'typical consumer' is, in my view, supposed to refer to the normal or average customer, i.e. the way a 'regular person' would perceive a transaction. This is not necessarily an easy or straight forward concept to apply.

2.6.4 Economic and commercial reality deviates from legal reality – substance over form?

The other cases where the CJEU refers to economic and/or commercial reality is rather a mixed bag of cases where the common denominator is the fact that the economic and commercial reality of the relevant transaction(s) deviates from the legal reality of this transaction (i.e. what parties to the transaction agreed). A form of 'substance over form' without the facts leading to actual abuse of law. Using the economic and

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145 CJEU Case C-276/09, Everything Everywhere Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:730, par. 26.

146 Cases C-349/96, Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise, ECLI:EU:C:1999:93, C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649, C-111/05, Aktiebolaget NN v Skatteverket, ECLI:EU:C:2007:195, C-94/09, European Commission v French Republic, ECLI:EU:C:2010:253 and C-276/09, Everything Everywhere Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:730.

147 Oxford Dictionary, on-line version, looking up 'typical'. Link: https://en.oxforddictionaries.com/definition/typical, last visited on 23 October 2017.

148 See CJEU cases C-259/10, Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc, ECLI:EU:C:2011:719, C-117/11, Purple Parking Ltd and Airparks Services Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2012:29, C-454/12, Pro Med Logistik GmbH v Finanzamt Dresden-Süd and Eckard Pongratz v Finanzamt Würzburg mit Außenstelle Ochsenfurt, ECLI:EU:C:2014:111 and C-219/13 K Oy, ECLI:EU:C:2014:2207.

commercial reality of the transaction as the basis for taxation in these cases leads to 'appropriate taxation'.[149] In a number of these cases, the CJEU points out that "(…) it must be recalled that consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (…)"[150] or that "(…) consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system (…)".[151] In these cases, the CJEU seems to use economic reality as the objective, factual reality of a transaction that should be used as a basis for determining the VAT consequences of that transaction. Economic and commercial reality was also used as a relevant criterion for the application of the VAT system in three cases concerning promotional activities (Loyalty Management, Baxi (joined cases) and EMI).[152] In two of these cases (the joined Loyalty Management and Baxi cases), the CJEU uses economic reality to describe the factual reality of a loyalty scheme, as opposed to what these schemes were designed to achieve from a VAT perspective.[153, 154] In these cases, the VAT treatment of the transactions is determined on the basis of the 'economic reality' rather than the 'legal reality' as included in the relevant agreements between the parties involved. In the other case (EMI), the CJEU refers to commercial reality to explain why the supply of free samples is excluded from the provisions under which the application or supply of goods for no consideration is treated as a supply for consideration, and therefore taxed: "(…) the objective of the exemption (…) in relation to 'applications for the giving of samples …' is to reflect the commercial reality that the distribution of samples is carried out in order to promote the product of which the samples are specimens, by allowing for the quality of that product to be assessed and for verification that the product has the qualities sought by a potential or actual buyer (…)".[155] Here, commercial reality is used in the sense of 'the way that taxable persons normally or usually run their businesses'. In yet another case (the Daimler and Widex-case), the CJEU holds that "(…) it is appropriate to point out that (…) the independence of the of status of the subsidiary was

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149 See, in this sense, J. Watson, K. Garcia, EU VAT and the Rule of Economics, 20 Intl. VAT Monitor 3, p. 190-197 (2009), Journals IBFD.

150 See CJEU cases C-158/98, Staatssecretaris van Financiën v Coffeeshop "Siberië" vof, ECLI:EU:C:1999:334, paragraph 18 and C-396/16 and T-2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o. (sedaj v stečaju) v Republika Slovenija, ECLI:EU:C:2018:109, paragraph 43,

151 CJEU case C-260/95, Commissioners of Customs and Excise v DFDS A/S, ECLI:EU:C:1997:77, paragraph 23.

152 CJEU joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590, paragraphs 41 and 42 and case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 22.

153 CJEU joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590, paragraphs 41 and 42.

154 See, in the same sense, J. Watson, K. Garcia, Babylonian Confusion Following the ECJ's Decision on Loyalty Rewards, 22 Intl. VAT Monitor 1, p. 12-16 (2011), Journals IBFD.

155 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 22.

disregarded in favour of the commercial reality (…)".[156] Here, commercial reality prevailed over legal reality in determining the relevant facts for applying the relevant VAT rules. In a way, this form of 'economic and commercial reality' is also a form of VAT neutrality, as it ensures that transactions that are similar, from an economic and commercial perspective, are treated the same for VAT purposes.[157]

2.6.4.1 The CJEU's economic and/or commercial reality

In the cases concerning abuse of law as discussed above, economic and/or commercial reality is used as a reflection of the objective factual elements to a transaction that are relevant for determining the VAT treatment of that transaction.

Abuse of law is a situation that is wholly artificial, but where the legal and economic reality coincide, in the sense that parties do as they have agreed and there is no difference between what they agreed and what they are actually doing. The CJEU holds that these transactions do not reflect 'economic reality' and that they should be redefined or ignored for VAT purposes.

There are also situations where parties have agreed something, but where what they actually do, in (economic) reality, is different from what they agreed. This can be either a deliberate deviation or unintentional. In these cases, the CJEU holds that economic reality, i.e. what parties actually do and not what they agreed, should be the basis for assessing the VAT consequences of the relevant transactions. The principle of neutrality requires that transactions that are the same from an economic perspective (or in economic reality) are treated the same for VAT purposes.

In the cases about composite supplies, 'economic reality' is also a way of establishing neutrality. It is (also) a species of neutrality, in the sense that if transactions are the same in economic reality, they should be treated the same from a VAT perspective. For this research framework, I will use economic and/or commercial reality as a reference point for examining whether the VAT treatment of voucher transactions and promotional activities under positive law is in line with the VAT treatment under appropriate or desired law. For that purpose, economic reality should be used to determine the objective nature of a transaction, which determines its VAT treatment.

2.6.4.2 Marks and Spencer: a UK case about VAT and economic reality

In the UK, judges that rule VAT cases have applied 'economic reality' (or 'commercial reality' or a combination of these realities) when determining the objective characteristics of a particular transaction and/or the relevant elements thereof, for

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156 CJEU joined cases C-318/11 and C-319/11, Daimler AG and Widex A/S v Skatteverket, ECLI:EU:C:2012:666, paragraph 49.

157 See, in the same sense, J. Watson, K. Garcia, EU VAT and the Rule of Economics, 20 Intl. VAT Monitor 3, p. 190-197 (2009), Journals IBFD.

applying the proper VAT treatment of that transaction.[158] In my view, this application of the concept of 'economic and commercial reality' is in line with the CJEU case law, as long as it concerns cases where there is a difference between legal reality and economic reality.

One of those cases (the Marks and Spencer case) deals with the VAT treatment of a specific transaction offered by a retailer: Buy any three (designated) food items for GBP 10 and get a bottle of wine (or another drink) for free.[159] The UK Tax Authorities disagreed with the retailer's view that the supply of the wine was indeed free. The supply of food items is subject to a local VAT rate of 0% in the UK, and because the value of the 'free' bottle did not exceed a certain threshold, the 'gift' was untaxed (no VAT was charged on the supply of the wine or the food). The UK court (First Tier Tribunal) held the following in this respect (emphasis by me, JB):

"96. I conclude that on a proper analysis of the terms and conditions of the Dine In Promotion the customer pays £10 in order to receive the three food items and the wine, so the price must be allocated across the four items for VAT purposes.
97. In my judgment this conclusion becomes even clearer when account is taken of the economic and commercial reality of the transaction.
98. Adopting the approach set out by Lord Neuberger in Secret Hotels 2 (quoted at [80]) and looking beyond the labels attached by M&S, the wine was not being supplied as a gift or for nil consideration. Applying what Lord Neuberger termed "commercial common sense" the term "free" was clearly being used in a marketing sense, as in a "buy two get one free" promotion. The economic and commercial reality was that M&S was offering a package of items – dine in for two for £10 with free wine – at an attractive discount to their aggregate shelf price if bought separately.
99. As acknowledged at [89], it is possible in principle for the economic and commercial reality of a transaction to accord with a contractual term describing it as free or as a gift. For a retailer, in-store samples of food or beverage might fall into this category. But a customer who walked into an M&S store during a Dine In Promotion and simply asked for his "free" bottle of wine would have been given short shrift.
100. The fact that the wine would usually be the most expensive item in the promotion in terms of separate shelf price reinforces this analysis of the economic and commercial reality."

In this case, the UK court uses economic reality to 'redefine' or 'reconsider' the transaction, and it bases the VAT consequences of that transaction on economic

158 See, for example, Revenue and Customs Comrs v LMUK Ltd [2013] UKSC 784; Secret Hotels 2 v Revenue and Customs Comrs [2014] UKSC 16; Airtours Holidays Transport Ltd v Revenue and Customs Comrs [2016] STC 1509, ING Intermediate Holdings Ltd v Revenue and Customs Comrs [2017] STC 320 and Marks And Spencer Plc v Revenue and Customs [2018] UKFTT 238 (TC).

159 Marks And Spencer Plc v Revenue and Customs [2018] UKFTT 238 (TC).

reality. The difficulty in this case is that in my view, the legal and commercial reality differ, but the opposite can also be argued: parties have agreed on a transaction where a free item is added to a composite supply made for consideration, and indeed no consideration was charged for that free item. In this kind of situation, 'economic reality' in the sense of 'the view of the typical consumer' should be used to determine the 'economic reality' in the sense of the 'objective facts' to test whether this is the same as the legal reality.

Some argue that this use of economic and commercial reality goes too far, as it breaches legal certainty. In the words of Van Doesum: "Indeed, such an infringement of legal certainty and the reclassification of transactions not carried out in the context of normal commercial operations is only possible by applying the abuse of rights doctrine. This doctrine is subject to conditions and is only to be applied as an 'ultimum remedium'. The abuse of rights doctrine cannot be simply circumvented by applying the 'economic reality' as an interpretation tool in itself. On the contrary, the abuse of rights doctrine contains an 'economic reality' test".[160]

2.6.5 The economic and commercial reality of a transaction as a reference point

Consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT.[161] This means that if businesses agree specific contractual terms, even though these contractual terms constitute a factor to be taken into consideration, they are not decisive for the purposes of determining the VAT consequences of the agreed transaction. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality.[162]

I will use economic and commercial reality to determine whether the existing VAT rules, as applied to promotional activities and transactions involving vouchers, lead to the 'desired result' based on the underlying fundamental principles of VAT. This means that I use the notion of economic reality to establish the actual, objective nature of a supply, in order to test whether the VAT treatment of a promotional activity or voucher transaction is in line with the VAT treatment under preferred or desired law, based on the relevant fundamental principles of EU VAT. I will also apply 'economic reality' as a means to establish whether a transaction is performed the way that taxable persons normally or usually run their businesses, in order to see whether the VAT treatment of

160 A.J. van Doesum, Economic Reality in EU VAT, published in De internationalisering van het belastingrecht / The Internationalization of Tax Law, Shaker Publishing BV (2016), p. 75-79.

161 See CJEU cases C-158/98, Staatssecretaris van Financiën v Coffeeshop "Siberië" vof, ECLI:EU:C:1999:334, paragraph 18, C-396/16 and T-2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o. (sedaj v stečaju) v Republika Slovenija, ECLI:EU:C:2018:109, paragraph 43,

162 CJEU case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409, paragraph 52.

the particular transaction is similar to the VAT treatment of similar transaction that are normally or usually performed by businesses.

For example, I will discuss businesses that pay money (as a cash-back) to the purchaser of one of their products at the end of the production and distribution chain, where this end customer did not purchase the product directly from the business granting the cash-back. The CJEU allows the business that pays this cash-back to lower his taxable amount for the original supply of the relevant product, even though that supply was not made to the person that receives the cash-back. Lowering that taxable amount is based on the relevant EU VAT provisions regarding discounts.[163] From a contractual perspective, it seems only possible to provide a discount in relation to a supply that was made at an earlier stage. What I mean by that is that in my view, a business can only grant a discount on a consideration that he has charged himself, and under the current EU VAT rules, a consideration is something that the business has received in return for his (own) supply.

Treating the cash-back as a discount does, in my view, not fit the current EU VAT rule framework. However, it is economic and commercial reality that the business that grants the discount does so in the furtherance of his business, and for the purpose of promoting the sale of his own products. Therefore, economic and commercial reality dictate that the business should 'bear' or 'enjoy' the VAT consequences of this payment. Under the principle of neutrality, in the sense that similar transactions should be treated the same, this business should in my view be allowed to deduct the VAT that is included in the payment (provided that the payment of the cash-back represents a VAT inclusive amount). I advocate that in these situations, where a business pays for part of a supply made to another party but where the payment is made purely for business purposes, this business should be allowed VAT deduction for his part of the payment. I call this the system of 'joint payment, shared deduction'. It is not based on any existing EU VAT legislation. It is, however, based on economic and commercial reality and these realities require (and justify) deduction, albeit under appropriate or desired law.

2.6.6 A concept developed by the CJEU as test for positive law?

Can a concept that is created or developed by the CJEU and that the CJEU deems to be a fundamental criterion for the application of the common system of VAT, be used for testing whether the application of positive law to promotional activities is in line with the fundamental principles that underlie EU VAT? In other words, can positive EU law be tested against a concept that is developed or created by an institution that was established to ensure that "the law is observed" "in the interpretation and application" of the Treaties, meaning – insofar as relevant for this research – that it interprets

163 See Articles 90-92 of the EU VAT Directive.

European Union law at the request of the national courts and tribunals?[164] If CJEU case law is part of positive law, can a concept created in positive law be used for testing it?

In my view, it can. It is the CJEU's mission to ensure that the law is observed, also by interpreting concepts of EU VAT law. This means that the CJEU also has to apply tests for ensuring that the law is applied. Where the law is insufficiently clear or where things (transactions, events) are not clearly covered by written law, the CJEU has to ensure that the correct VAT rules are applied anyway. The CJEU does this by providing interpretation of EU concepts. Courts or judges use interpretation to come to a fair decision. Their rulings link in and are often based on previous rulings and at the same time add to this jurisprudence. With each ruling, a court or a judge has to be aware of the fact that that he will have to take positive law into account, assess it and that his ruling will be a part of this positive law that will be used as the basis for future rulings.[165] This applies even more to common law, where the legal form is based on court rulings previously made in similar cases (decisions) and this jurisprudence is leading, as opposed to 'continental law' or 'civil law', which is based on legislation imposed by the national government.[166] The whole concept of common law is based on courts interpreting, applying and commenting on their own and their colleagues' earlier rulings, adding to positive law.

In summary, the concept of economic and commercial reality is a useful test for establishing whether the application of positive law to determine the EU VAT consequences of certain transactions are in line with the fundamental underlying principles of EU VAT and therefore constitute desired or appropriate law.

2.7 Conclusion

In this research, I examine the EU VAT treatment of vouchers in the context of promotional activities. I will use positive law as a basis for this research, in order to establish how promotional activities are treated under the existing EU VAT rules (positive law). I will also establish whether this VAT treatment of promotional activities and transactions involving vouchers is in line with some general principles underlying the EU VAT system and the characteristics of the EU VAT system.

For this purpose, I will use the following two tests for this research:

- economic reality, as a manifestation of the principle of neutrality, and

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164 From the 'General Prestentation' about 'The Institution' on the CJEU's website, to be accessed on https://curia.europa.eu/jcms/jcms/Jo2_6999/en/, last accessed on 11 June 2018.

165 S.B. Cornielje, Fusies en overnames in de Europese btw, Fiscale Monografieën 146, Wolters Kluwer (Netherlands) 2016, p. 25.

166 G. Hughes, Common Law Systems, published in Fundamentals of American Law, New York University School of Law, Oxford University Press, New York, 2016, p. 9-25.

- the characteristics of the EU VAT, and in particular the purpose of EU VAT that requires taxation of (expenditure for) private consumption.[167]

I will use these tests to establish whether the application of positive law is in line with appropriate or desired law, where I base the latter on the principles and characteristics mentioned. If the VAT treatment of the relevant transaction is not in line with appropriate or desired law, I will suggest a VAT treatment of these transactions that is based on these principles and characteristics.

These two main tests, that constitute the analytical framework of this research, coincide with what I described in Section 1.1 as 'the tension between the right to deduct VAT on business related costs and the need to tax consumption'.

[167] This includes the characteristic that VAT should be deductible throughout the production and distribution chain, i.e. that VAT should not be a cost if incurred on business expenditure.

3 Transactions that are subject to VAT and economic activities

This research aims to cover the (EU) VAT treatment of vouchers (or voucher transactions) in the context of promotional activities. Transactions only have VAT consequences if they are inside the scope of the relevant VAT rules and regulations.[168] Many transactions and activities are outside the scope of (EU) VAT. Only economic activities are within the scope of VAT, and only taxable economic transactions can be subject to VAT. However, activities or events exist that are not taxable transactions but that are considered economic activities. An example of this would be the purchase of a business asset by a taxable person acting as such for use for his business activities. Also, agreeing to a payment (and paying) for a supply of goods or services does not necessarily mean that the supply is an economic activity that is subject to VAT. It can be that no (sufficiently) direct link exists between the goods or services supplied or to be supplied and the agreed payment, which would mean that the supply of those goods or services cannot be classified as being effected for consideration from an EU VAT perspective.[169] It can also be that the taxable person that performs the supply for which he receives an agreed payment, is not acting in his capacity of taxable person ('as such'), e.g. because he's not performing an economic activity.[170] It can also be that the supplier does not qualify as a taxable person at all. If a private individual would decide to sell her bicycle to another private individual, this would constitute a supply of a good for consideration, but not performed by a taxable person (acting as such) and therefore neither an economic activity nor an activity that is subject to VAT.

The relevance, from a VAT perspective and in relation to my research, of whether or not a supply is made for consideration, and whether that supply qualifies as an economic activity, is that if certain transaction are not made 'for consideration', they can still be considered 'economic activities' and even be subject to VAT (i.e. taxed) by treating these supplies as if they are made for consideration. Goods and services are often given away 'for free' as part of promotional activities and through the use of vouchers, which makes the VAT treatment of those transactions relevant to this research. This means that whenever a supply is made it is relevant to determine whether it is made for consideration, whether the supply is subject to VAT and whether that supply qualifies as an economic activity.

Only supplies of goods and services that are not made for consideration (i.e. that are supplied 'free of charge') but that do qualify as economic activities, may be treated as

168 Obviously, VAT on costs incurred in relation to non-economic activities by a non-taxable person cannot be deducted, and this can be considered a 'VAT consequence'. The 'VAT consequences' I refer to here are the treatment of the transaction itself (the 'output'), not the consequences on other transactions such as purchase made in relation to the activity.

169 See, for example, CJEU Case C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392, paragraphs 48 and 49.

170 See, for example, CJEU Case C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334

if they were made for consideration under the EU VAT system.[171,172] Supplies that do not qualify as economic activities cannot be treated 'as if they were made for consideration'. For these transactions, other VAT adjustment systems may have to be applied if these goods or services are used, applied or disposed free of charge. I will elaborate on how certain deployment or use of goods and services free of charge may be subject to VAT. For this chapter, a brief description suffices, which I will provide here.

Under Article 16 of the EU VAT Directive, the application by a taxable person of business assets (goods) for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. However, this does not apply to the application of goods for business use as samples or as gifts of small value.[173] Also, under Article 26 of the EU VAT Directive, the use of business assets (goods) for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible, shall be treated as a supply of services for consideration. Lastly, the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business, shall also be treated as a supply of services for consideration. For these latter services, the rules do not stipulate that VAT on costs was deducted.[174]

Under the current EU VAT rules and regulations and as a result of case law from the CJEU, a number of requirements exist that need to be met for a supply to be subject to VAT.

In practice, 'transactions that are subject to VAT' are often referred to as 'taxable transactions'. Under the EU VAT Directive, only four types of well-defined transactions are considered 'subject to VAT'.[175] These transactions are only actually taxable and therefore potentially subject to VAT if they qualify as 'economic activities'.[176]

It is not always easy to establish whether vouchers, or the goods or services or the preferential treatment that the vouchers can be used for, are provided free of charge or for consideration. Under the current VAT rules, it can be argued that issuing free SPVs[177] could lead to taxation at the time of issuing or transferring the SPVs, even

171 See CJEU Cases C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88 and C-400/15, Landkreis Potsdam-Mittelmark v Finanzamt Brandenburg, ECLI:EU:C:2016:687, paragraph 30.

172 Insofar as the VAT incurred on the purchase of the goods that are applied free of charge has been deducted, see Article 16 of the EU VAT Directive.

173 See Article 16 of the EU VAT Directive.

174 See Article 26 of the EU VAT Directive.

175 See Article 2 of the EU VAT Directive.

176 See Article 9 of the EU VAT Directive.

177 Single Purpose Vouchers, see Section 9.5.2.2.

though I am of the opinion that this should not be the case.[178] It is also relevant to establish whether a voucher transaction was indeed performed for free, because the facts of a voucher transaction could, for example, lead to the conclusion that, actually, a consideration in kind was paid for the vouchers.[179] The VAT treatment of vouchers that are supplied free of charge depends on different factors, as does the VAT treatment of the supply of goods or services in return for free vouchers. Using vouchers should not affect this 'direct link' between a payment and a (subsequent) supply.

I will now elaborate on the concepts of 'transaction subject to VAT' and 'economic activity'.

3.1 Transactions subject to VAT

Four types of transactions are considered subject to VAT in the EU VAT Directive:

- the supply of goods,
- the supply of services,
- the intra-Community acquisition of goods and
- the importation of goods.[180]

Of these four transactions, the supply of goods, the supply of services and the intra-Community acquisition of - goods are – as a general rule – only considered subject to VAT if they are performed for consideration, within the territory of a Member State and by a taxable person acting as such.[181],[182],[183] The importation of goods does not need to be performed for consideration nor by a taxable person acting as such for it to be subject to VAT.

Besides the requirements mentioned above, the CJEU has determined that a transaction can only be subject to VAT if there is 'consumption by an identifiable consumer or group of consumers'[184] and if the transaction is not subject to a 'total legal prohibition on importation and marketing in the EU'.[185] As these two elements are not directly relevant for my research, I will assume in the rest of this research that the supplies I describe or use as examples are not subject to a total legal prohibition on importation and marketing in the EU and that there is consumption by an identifiable consumer or group of consumers – unless I specifically indicate otherwise. I will briefly touch upon situations where there is consumption by an identifiable

178 As I explain in Section 9.5.2.6.

179 For the EU VAT treatment of considerations in kind, or barter transactions, see Section 7.

180 See Article 2(1) of the EU VAT Directive.

181 See Article 2(1) of the EU VAT Directive.

182 Supplies of goods and services can in certain cases lead to a non-taxable person being regarded as a taxable person for that specific supply, but this is outside the scope of this research. See, for example, Article 13 of the EU VAT Directive.

183 Besides taxable persons acting as such, non-taxable legal persons can also perform intra-Community acquisitions and so can non-taxable persons if the good is a 'new means of transport'. See Article 2(1)(b) of the EU VAT Directive. The definition of 'new means of transport' can be found in Article 2(2) of the EU VAT Directive.

184 CJEU Case C-215/94, Juŕgen Mohr and Finanzamt Bad Segeberg, ECLI:EU:C:1996:72, paragraphs 19-22.

185 CJEU Case C-289/86 , Vereniging Happy Family Rustenburgerstraat and Inspecteur der Omzetbelasting, ECLI:EU:C:1988:360.

consumer or group of consumers and transactions that are subject to a total legal prohibition on importation and marketing in the EU in Sections 3.8 a) and b) respectively.

From the above, it is clear that a supply of goods, a supply of services and an intra-Community acquisition of goods need to meet certain requirements in order to be considered subject to VAT. Because a relevant part of this research deals with the concept of 'consideration', I will first briefly touch upon the other requirements for these transactions to be subject to VAT before examining the requirement that, in order to be subject to VAT, these transactions need to be performed 'for consideration'.

Focussing on the supply of goods[186] and services,[187] being the main manifestations of promotional activities and the main supplies that vouchers are redeemed for, these transactions are subject to VAT if they are performed for consideration within the territory of a Member State by a taxable person acting as such. Five elements can be distinguished here:

- There must be a supply of goods or services
- For consideration
- By a taxable person
- Acting as such
- Within the territory of a Member State.

I will now discuss these elements.

3.2 A supply of goods or services

3.2.1 A supply of goods

Under the current EU VAT rules, a supply of goods is defined as "the transfer of the right to dispose of tangible property as owner".[188] This definition applies to the 'general' scenarios (i.e. not based on VAT rules) of supplies of goods, where two parties agree that one will supply one or more goods and the other party will receive and accept these. It is clear from the relevant provision that only tangible, physical objects can be considered 'goods' from an EU VAT perspective. The concept of 'goods' is an independent concept of Union law, making it irrelevant if (different) definitions of 'goods' exist in national (civil or other) law of the Member States.[189]

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186 Under the EU VAT rules, goods are defined as 'tangible property' as well as electricity, gas, heat or cooling energy and the like (Articles 14(1) and 15(1) of the EU VAT Directive). Member States may regard certain interests in immovable property, rights in rem giving the holder thereof a right of use over immovable property and shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof, as tangible property (Article 15(2) of the EU VAT Directive).

187 'Supply of services' shall mean any transaction which does not constitute a supply of goods (Article 24(1) of the EU VAT Directive).

188 Art. 14(1) of the EU VAT Directive.

189 For a more comprehensive description of the EU VAT concept of 'goods' I refer to Van Doesum, Van Kesteren and Van Norden, Fundamentals of EU VAT Law, Wolters Kluwer Law International (Netherlands), 2016, section 3.2.2 (p. 105 and further).

Even though the concept of 'goods' seems quite straight forward, the number of cases about whether a supply qualifies as a supply of goods or services demonstrates the opposite. Examples of cases ruled by the CJEU in this respect concerned animals,[190] food and drinks supplied in a restaurant,[191] printing services,[192] the supply of software on a carrier medium[193] and the supply of certain food and drink items by (amongst others) cinemas and butchers.[194] By law, electricity, gas, heat, cooling energy and the like are treated as tangible property for VAT purposes.[195] Also, Member States are allowed to regard certain interests in immovable property as tangible property, as well as rights in rem giving the holder thereof a right of use over immovable property and shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.[196] From a VAT perspective, the difference between 'goods' and 'services' is relevant for the application of a number of provisions, e.g. with regard to determining the place of supply, the application of VAT rates and the application of VAT exemptions.

For this research, the answer to the question whether a supply qualifies as a supply of goods or a supply of services is also relevant because the VAT treatment of the application of business assets (free of charge), which can be treated as a supply of goods for consideration, can differ from the VAT treatment of the use of business assets or the provision of services free of charge, which can be treated as the supply of a service for consideration.[197] I will elaborate on this in Chapter 6.

Case law not only exists about whether the object of the transaction qualifies as a goods or a service, but also about whether, in the case of goods, the right to dispose of the tangible goods as owner is effectively transferred. If this is the case, there is a supply of goods. If the right is not transferred, the transaction qualifies as a service. A number of cases have been referred to the CJEU about the question whether certain types of leasing should be qualified as the transfer of the right to dispose of the lease objects as if the lessees were the owner of those goods (instead of a service).[198]

The supply of goods, i.e. the transfer of the right to dispose of the goods as owner, requires a legal relationship between the supplier and the recipient of the goods. It follows from the wording of the relevant provision that the concept of supply of goods

190 CJEU Case C-320/02, Förvaltnings AB Stenholmen v Riksskatteverket, ECLI:EU:C:2004:213.

191 CJEU Case C-231/94, Faaborg-Gelting Linien A/S v Finanzamt Flensburg, ECLI:EU:C:1996:184

192 CJEU Case C-88/09, Graphic Procédé v Ministère du Budget, des Comptes publics et de la Fonction publique, ECLI:EU:C:2010:76

193 CJEU Case C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649

194 CJEU Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09, Finanzamt Burgdorf v Manfred Bog (C-497/09), CinemaxX Entertainment GmbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst (C-499/09), Lothar Lohmeyer v Finanzamt Minden (C-501/09) and Fleischerei Nier GmbH & Co. KG v Finanzamt Detmold (C-502/09), ECLI:EU:C:2011:135

195 See Article 15(1) of the EU VAT Directive.

196 See Article 15(2) of the EU VAT Directive.

197 See Articles 16 (for goods) and 26 (for services) of the EU VAT Directive.

198 See, for example, CJEU cases C-277/09, The Commissioners for Her Majesty's Revenue & Customs v RBS Deutschland Holdings GmbH, ECLI:EU:C:2010:810, C-118/11, Eon Aset Menidjmunt OOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECLI:EU:C:2012:97 and C-164/16, Commissioners for Her Majesty's Revenue & Customs v Mercedes Benz Financial Services UK Ltd, ECLI:EU:C:2017:734.

does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner. The theft of goods, for example, makes the thief the mere possessor of the goods. It does not have the effect of empowering him to dispose of the goods under the same conditions as their owner.[199] This 'empowering' would require, in my view, a legal relationship between the parties involved. I will elaborate on the concept of 'legal relationship' in Section 3.3.1.

In situations where a supply consists of multiple elements, which can be both goods and services, the supplier will have to determine whether he makes one or more supplies and, if he makes one (composite) supply, whether that supply qualifies as the supply of goods or services. I will elaborate on multiple element supplies in Chapter 4.

3.2.2 A supply of services

Under the EU VAT Directive, a supply of services shall mean any transaction which does not constitute a supply of goods.[200] This explains why only a definition of 'goods' is included in the EU VAT Directive. The EU VAT Directive does provide provision that include examples of services[201] and that prescribe certain transactions to be treated as the supply of services for consideration.[202]

Technically, the 'catch-all' definition of services is not entirely accurate. Both the intra-Community acquisition of goods and the importation of goods are transactions that do not constitute the supply of goods.[203] However, it is clear that these transactions do not qualify as services either.

3.2.3 A supply or 'part of the taxable sales'?

Some supplies are subject to VAT even though there is no consideration. These supplies are 'treated as if they were made for consideration' under the relevant provisions from the EU VAT Directive,[204] because since VAT is a tax on (expenditure on) consumption, the result of these supplies (i.e. private consumption) should be taxed. I will discuss the VAT treatment of free supplies in Chapter 6. However, it should be noted here that in order to be able to tax a supply by treating it as a supply made for consideration, there has to be a 'supply' in the first place.

With regard to the application of goods that are business assets, Article 16 of the EU VAT Directive dictate that if this is done by a taxable person for his private use or for that of his staff, or where these goods are disposed free of charge or, more generally,

199 See, for example, CJEU cases C-435/03, British American Tobacco International Ltd and Newman Shipping & Agency Company NV v Belgische Staat, ECLI:EU:C:2005:464 and C-438/13, BCR Leasing IFN SA v Agenţia Naţională de Administrare Fiscală – Direcţia generală de administrare a marilor contribuabili and Agenţia Naţională de Administrare Fiscală – Direcţia generală de soluţionare a contestaţiilor, ECLI:EU:C:2014:2093.

200 Art. 24(1) of the EU VAT Directive.

201 See, for example, Article 25 of the EU VAT Directive.

202 See, for example, Article 26 of the EU VAT Directive.

203 Under Article 2 of the EU VAT Directive, these activities both qualify as 'transactions'.

204 See Articles 16 and 26 of the EU VAT Directive.

where they are applied for purposes other than those of his business, these applications/disposals shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. With regard to services, Article 26 of the EU VAT Directive brings about that the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible shall be treated as a supply of services for consideration. This also applies to the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.

In my view, the application or disposal of goods for no consideration is always covered by the relevant provision, because these transactions are covered by the Union concept of 'supply of a good' (the transfer of the right to dispose of the good as owner). For services, and especially the use of business assets, this may be considered debatable.

On the one hand, it can be argued that the 'use' of (potential) customers of a building in which a retailer has established his shop, including lifts and toilets for (potential) customers, should not be considered a (free) supply in the sense of the above provisions. Advocate General Kokott (of the Court of Justice of the EU) holds this view. In her opinions in the Sveda case, she discusses situation where a taxable business allowed people to make use of a footpath,[205] that they had constructed in nature, for no consideration. Kokott holds that "…the footpath was used by the taxable person itself to conduct its own economic sales activity. The involvement of an independent third party, the municipality, which, with the services received, pursues its own purposes of water supply, makes this case different from Sveda. Acquiescence in relation to use of the footpath for one's own business (comparable to Sveda) is not an independent supply to a third party, but merely part of the taxable sales".[206] Allowing people to park their car in a car park that belongs to a shopping centre, or allowing them to walk through the heated shop for free is not a supply (as such) under this rationale. Kokott considers this a 'dependent ancillary supply', which means that "it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied".[207] I find that strange, because in my view, something that is not a supply in itself cannot be ancillary to other supplies. It is not a supply. Also, in order for a supply to be ancillary to another ('main') supply, there has to be a main supply to the same person as the ancillary supply (see Chapter 4). In the case of the footpath, there will be people that use the path without purchasing anything form its owner. The same applies to car parks and shops: they are not only used by people that actually make a purchase. If they can only be used by people that make a purchase, I agree with Kokott. Also, in my view, it is practically impossible to establish the exact

205 CJEU case C-126/14, UAB "Sveda" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, ECLI:EU:C:2015:712.

206 Opinion of Advocate General Kokott in case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:283, paragraph 45.

207 Opinion of Advocate General Kokott in case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:283, paragraph 46.

tipping point where use of a business asset would transform from a non-supply to a supply, even though that is not a real technical argument against applying this rationale.

On the other hand, it can be argued that all use of business assets should be qualified as a supply. Even Kokott seems to adhere to this view where she holds that this type of use should be considered a 'dependent ancillary supply' (see above), i.e. a supply. In my view, the use of the path as referred to by Kokott as well as the use of the building and the car park all qualify as supplies. However, this use of the business assets should not be taxed because the business assets are not used for purposes other than those of the business. The element of 'private consumption' is insignificant compared to the business use. Still, in my view, this type of use should be considered a supply for VAT purposes. This may also explain why, contrary to the provision that taxes the application of goods, the relevant provision for taxing the use of business assets does not include the words "…or their disposal (use in this case, JB) free of charge, or…". By not including that, a discussion about 'free use for business purposes' is avoided.[208]

3.3 Supply (of goods or services) made for consideration

In ordinary language, 'consideration' usually means payment for a service or a supply of goods.[209] Consideration, therefore, implies reciprocity (payment for something in return) or some form of exchange.[210] This would require two parties to agree to make a supply of a good and/or a service where the other party supplies something in return, which can be money, goods and/or services. In my view, there can be no 'reciprocal' performance, or a 'quid pro quo'[211] without parties to that performance agreeing on the terms (i.e. on the supply and the consideration). The relation between the 'quid' (something) and the 'quo' (something) in a 'quid pro quo' doesn't exists without the 'pro' (in return for), and 'in exchange for' implies that parties are in agreement, because without the agreement, either supply is not connected with the other. In a reciprocal, or quid pro quo exchange, one transfer of goods or services is contingent upon the other transfer. The very definition of quid pro quo, 'something in exchange for something', implies that a mutually beneficial arrangement has been reached. Reaching an arrangement means agreeing on something. Also, 'exchange' implies agreement between parties – in my view, there is no such thing as 'unilateral exchange'.

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208 I have not come across any relevant literature on this specific point.

209 Consideration: a payment for a service (Definition of consideration noun (MONEY). From the Cambridge Advanced Learner's Dictionary on-line, 22 January 2010, http://dictionary.cambridge.org/define.asp?key=1090687&dict=CALD&topic=costs-expenses)

210 Return: exchange. Definition: in return – in exchange (Definition of return noun (EXCHANGE) from the Cambridge Advanced Learner's Dictionary on-line, 3 August 2011, http://dictionary.cambridge.org/dictionary/british/return_7

211 Reciprocity is sometimes referred to as a 'quid pro quo', see the European Commission's view in the Town & County Factoring case (Opinion of the Advocate General, CJEU case C-498/99, Town and County Factors Ltd v Commissioners of Customs and Excise, ECLI:EU:C:2001:494, paragraph 28. Also see the opinion of the Advocate General in case C-33/93, Empire Stores Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1994:106, paragraph 14.

Even though from an economic perspective it can be argued that a business will never do anything 'for free',[212] in my view, a consideration for a supply requires a direct link between the supply and the consideration. When a business makes a supply 'for free', this does not mean that he doesn't endeavour to ensure that income covers expenditure.[213] It only means that no 'direct' consideration was paid (or received) for this supply. In my view, reciprocity, or 'quid pro quo', requires that parties actually specifically agree to a certain supply and a specific consideration. This is also the approach taken by the CJEU.

In the EU VAT Directive, the concept of 'consideration' serves two main purposes. First, transactions can only be subject to VAT if they are performed 'for consideration'.[214] Some supplies of goods or services that are made 'free of charge',[215] are treated as if performed for consideration, to ensure equal treatment as between a taxable person who applies goods for his own private use or that of his staff, on the one hand, and a final consumer who applies goods for his own private use or for that of his staff, on the other.[216] In this research, I will investigate the VAT treatment of the application or use of business assets for private purposes, or their disposal free of charge or, more generally, their application for purposes other than those of his business, and the supply of services carried out free of charge for private use or, more generally, for purposes other than those of his business,[217] since 'promotional activities' can have the shape of such transactions.

Second, the concept of 'consideration' is used for determining the taxable amount, i.e. the amount on which the amount of VAT due should be based ('…everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply…').[218]

Going back to the concept of 'consideration' as a requirement for a transaction to be subject to tax: in the English language version of the two main predecessors of the

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212 See, for example, Friedman, There's No Such Thing as a Free Lunch, Open Court Publishing Company, 1975. ISBN 087548297X.

213 See, for example, the views of certain EU governments on this as worded in CJEU case C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 25.

214 See Article 2 of the EU VAT Directive.

215 It is clear from CJEU case law that a supply is made 'for consideration' it is not made 'free of charge', meaning that these concepts are opposites (C-412/03, Hotel Scandic Gåsabäck AB v Riksskatteverket, ECLI:EU:C:2005:47, paragraph 23).

216 See, for example, CJEU Cases C-438/13, BCR Leasing IFN SA v Agenţia Naţională de Administrare Fiscală – Direcţia generală de administrare a marilor contribuabili and Agenţia Naţională de Administrare Fiscală – Direcţia generală de soluţionare a contestaţiilor, ECLI:EU:C:2014:2093, paragraph 23, C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 17 and C-412/03, Hotel Scandic Gåsabäck AB v Riksskatteverket, ECLI:EU:C:2005:47, paragraph 23

217 See Articles 16 and 26 of the EU VAT Directive.

218 In this respect, the provision that is most relevant for this research is Article 73 of the EU VAT Directive.

current EU VAT Directive[219] as well as in the current Directive, the term 'consideration' is used for that latter purpose, i.e. for determining the taxable amount. In the English language version of the Second Directive, supplies were subject to VAT if they were performed 'against payment', whereas in the English language versions of the subsequent Directives, this was changed to 'for consideration'.

This raises the question whether the original (English language) requirement for a transaction to be subject to VAT, being that it had to be made against payment, has changed by changing the 'against payment' to 'for consideration'. In my view, 'against payment' and 'for consideration' in the sense of the relevant provisions of the EU VAT rules should be interpreted the same.

Grounds for that view can be found in the fact that the expression used in either provision (for determining when a transaction is subject to VAT and for determining the taxable amount) was not changed in other language versions of the VAT Directive(s).[220] Also, no explanation was provided as to why this change was made in the English language version of that expression, where an explanation would have been appropriate if a true 'change' had been intended. In my view, the change should only be considered a change in wording, not in content or meaning of the expression.[221] Further, the CJEU's interpretation of the expression used in the different versions of the Directive has not changed – in fact, for the interpretation of the provision in the Sixth VAT Directive ('for consideration'), the CJEU refers to and uses its own interpretation of the relevant provision in the Second VAT Directive ('against payment').[222]

There is no definition of the concept of '(for) consideration' as '(against) payment' in the EU VAT Directive. For determining the taxable base, 'the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply´.[223] This implies that ´consideration´ is obtained in return for the supply, which suggests reciprocity.

Under CJEU case law, a supply is only made 'for consideration' if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the

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219 The Second VAT Directive (Second Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax (67/228/EEC), OJ 1303/67, 14 April 1967) and the Sixth VAT Directive (Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (77/388/EEC), OJ L 145 , 13 June 1977, p. 1).

220 I only checked the Dutch, Italian, French, and German language versions, since those were the only official EU languages in in which the Second VAT Directive was published in 1967 (the Member States being Belgium, France, Germany, Italy, Luxembourg and the Netherlands).

221 For a different view, see Pincher, R.A., Consideration: its meaning for the purposes of VAT, with particular reference to reverse considerations (Thesis), The Institute of Taxation, Thesis No. 527, 1994, p. 7-10.

222 CJEU Case 102/86, Apple and Pear Development Council and Commission of Customs and Excise, ECLI:EU:C:1988:120, paragraph 10.

223 Article 73 of the EU VAT Directive.

recipient.[224] The elements that are required for a payment to qualify as consideration are, therefore:

- There has to be a 'legal relationship' between the parties involved,
- This 'legal relationship' has to entail 'reciprocal performance', and
- The remuneration has to constitute the value actually given in return for the supply.

I will now discuss these elements.

3.3.1 Legal relationship

The first time the CJEU mentioned a legal relationship between parties as a requirement for a transaction to be subject to VAT was when it mentioned that taxable transactions presuppose the stipulation of a price or consideration.[225] The CJEU later elaborates on this by stating that a supply is effected 'for consideration', and hence is taxable, "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient".[226]

The concept of 'legal relationship' is a concept of Union law, which does not necessarily coincide with the definition or concept of a legal agreement in the local rules and legislation in the EU Member States.[227] Parties may agree to a specific transaction and perform the transaction, assuming that the transaction has a specific VAT treatment, for example based on local civil law or local interpretation of EU VAT rules, whereas from an EU VAT perspective the actual VAT treatment is different. Because VAT is levied based on EU rules and independent concepts of Union law, local civil (or other) legislation has no effect on the VAT treatment of a transaction.[228]

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224 CJEU Case C-16/93, R. J. Tolsma and Inspecteur der Omzetbelasting Leeuwarden, ECLI:EU:C:1994:80.

225 CJEU Case 89/81, Staatssecretaris van Financiën v Hong-Kong Trade Development Council, ECLI:EU:C:1982:121, paragraph 10.

226 CJEU Case C-16/93, R. J. Tolsma and Inspecteur der Omzetbelasting Leeuwarden, ECLI:EU:C:1994:80, paragraph 14.

227 See, in the same sense, CJEU case C-498/99, Town & County Factors Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2002:494, paragraph 21.

228 CJEU Case C-320/88, Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV, ECLI:EU:C:1990:61, paragraph 8.

The agreement does not have to be in writing (e.g. a contract).[229] However, in my view it must be clear from the facts and circumstances that this legal relationship or agreement exists.[230] The agreement does not have to be enforceable by law either.[231]

I note here that even though contractual terms are important in categorising a transaction as a taxable transaction, it is necessary to bear in mind that consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT.[232] Normally, the contractual position reflects the economic and commercial reality of a transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a transaction have to be identified. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions. If the contractual terms do not genuinely reflect economic reality, those terms would have to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.[233]

The fact that an activity consists in the performance of duties conferred and regulated by law in the public interest is irrelevant for the purposes of determining whether that

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229 See, for example, Case C-484/06, Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën, ECLI:EU:C:2008:394, which concerns supermarkets that offer a standard range of foodstuffs or other products to its customers (private individuals). No written contract was concluded between the supermarket and the customers in which they had stipulated to sell certain goods for an agreed price. I assume that this was clear from the 'business model' or 'sales method' applied, see also CJEU cases C-230/87, Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise, ECLI:EU:C:1988:508, paragraph 24 and C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 27.

230 Confirmation of this view can also be found in two OECD documents published by the Centre for Tax Policy and Administration, composed by the Committee of Fiscal Affairs' Working Party No 9 on Consumption Taxes, the first from January 2008 titled "Applying VAT/GST to Cross-Border Trade in Services and Intangible – Emerging Concepts for Defining Place of Taxation – Invitation for Comments", page 5 (footnote 3): "'business agreement' is taken to mean any agreement, regardless of form, between persons acting in a business capacity that underlies the provision of a supply. (In most cases, documentation will reflect the existence of the business agreement.)" and the second from 2010 titled "OECD International VAT/GST Guidelines - International Trade in Services and Intangibles - Public Consultation on Draft Guidelines for Customer Location", page 9: "Business agreements consist of the elements that identify the parties to a supply and the rights and obligations with respect to that supply. They are generally based on mutual understanding. The term "business agreement" has been adopted because it is a general concept, rather than a term with a technical meaning, and it is not specific to any particular jurisdiction. In particular, it is not restricted to a contract (whether written or in some other format) and is therefore wide in its application". These documents can be found on the website of the OECD: http://www.oecd.org/department/0,3355,en_2649_33739_1_1_1_1_1,00.html

231 See CJEU Case C-498/99, Town & Country Factors Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2002:494, pars. 16-24.

232 See Chapter 2.

233 CJEU Case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409, paragraphs. 42-45 and 49-50.

activity can be classified as a supply of services effected for consideration.[234] Even where an activity is designed to fulfil a constitutional obligation exclusively and directly incumbent upon the Member State concerned, the direct link between the supply of services and the consideration received cannot be called into question by this fact alone.[235] This means that a relationship based on law qualifies as a 'legal relationship' in the sense of EU VAT. I note that a 'relationship' requires rights and obligations for more than one party. There are also obligations imposed by law that are unilateral, such as the payment of taxes.[236] However, this is still a legal relationship, as it is an obligation linking the tax debtor to the state.

3.3.2 Legal relationship entailing reciprocal performance

As mentioned in Section 3.3.1, for a transaction to be made 'for consideration', the CJEU requires that a legal relationship must exist, pursuant to which there is reciprocal performance.[237] This means that a legal relationship should not impose unilateral obligations (as mentioned above) but rights and obligations for both parties to the legal relationship, based on which one party performs a supply of goods and or services for the other party where the other party agrees to pay something (cash, goods, services or a combination thereof) in return. Combining the requirement for a legal relationship entailing reciprocal performance with the fact that the CJEU requires the stipulation of a price or consideration, this legal relationship should also include the stipulation of a price or consideration in return for a supply of goods and/or services. If parties have not (specifically) stipulated that a price or consideration is paid in return for the supply goods or services, the payment is not considered (part of the) consideration for those supplies, unless specific rules dictate that these payments should be considered (part of) the consideration.[238] These last rules aren't relevant for determining the VAT treatment of voucher transactions or loyalty schemes and therefore outside the scope of this research.

If parties have not (specifically) stipulated that a price or consideration is paid in return for the supply of goods or services,[239] the payment is not considered (part of

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234 See, to that effect, CJEU cases C-276/97, Commission of the European Communities v French Republic, ECLI:EU:C:2000:424, paragraph 33, and C-246/08, Commission v Finland, ECLI:EU:C:2009:671, paragraph 40.

235 See, to that effect, CJEU cases C-174/14, Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública, ECLI:EU:C:2015:733, paragraph 39 and C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392, paragraph 42.

236 CJEU case C-36/16, Minister Finansów v Posnania Investment SA, ECLI:EU:C:2017:361, paragraphs 32-33.

237 See, inter alia, Case C-16/93, R. J. Tolsma and Inspecteur der Omzetbelasting Leeuwarden, ECLI:EU:C:1994:80, paragraph 12, Case C-2/95, Sparekassernes Datacenter (SDC) v Skatteministeriet, ECLI:EU:C:1997:278, paragraph 45, Case C-305/01, Finanzamt Groß-Gerau and MKG-Kraftfahrzeuge-Factoring GmbH, ECLI:EU:C:2003:377, paragraph 47 and Case C-246/08, Commission of the European Communities v Republic of Finland, ECLI:EU:C:2009:671, paragraph 43.

238 See Articles 78 of the EU VAT Directive.

239 See, inter alia, Case 89/81, Staatssecretaris van Financiën v Hong Kong Trade Development Council, ECLI:EU:C:1982:121, paragraph 9 and 10, Case C-16/93, R. J. Tolsma and Inspecteur der Omzetbelasting Leeuwarden, ECLI:EU:C:1994:80, paragraph 12 and Case C-246/08, Commission of the European Communities v Republic of Finland [2009] ECR I-10605, C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392, paragraph 43.

the) consideration for those supplies.[240],[241] The CJEU also ruled a number of specific cases where, even though no specific amount payable was agreed or included in the reciprocal agreement, there was still a payment or consideration for a supply. In all of these cases, the reciprocal performance was clear from and implicitly agreed by applying or following the relevant (agreed) 'business model' or 'sales method'.[242]

In two of those cases (the 'Glawe-case' and the 'First National Bank of Chicago-case'),[243] a VAT exemption applied to the supply and the 'supply' consisted of money (cash). For these specific types of transactions (where money is the object of the transaction), the CJEU has explained that technical difficulties exist in determining the amount of the consideration received in return for the transactions.[244] However, this in itself cannot justify the conclusion that no consideration exists. For these types of transactions, it is apparently not necessary that (both) parties know the exact amount they pay or receive from each individual customer or for every single supply for the payment for the transaction to qualify as a consideration, as long as parties understand that they make a(n implicit) payment in return for an agreed supply. Technical difficulties may also arise when determining the amount of the consideration in barter transactions (where goods and/or services are supplied in return for goods and/or services), because the 'subjective' value of the consideration received is not agreed as such.[245] Be that as it may, it is clear that barter transactions also constitute 'quid pro quo' types of supplies for consideration.

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240 It is not necessary to agree a payment for a supply of goods or services to make this supply subject to VAT. See, for example, Art. 16 and 26 of the EU VAT Directive concerning deemed supplies of goods and services.

241 This is different if specific rules dictate that these payments should be considered (part of) the consideration, see Art. 78 of the EU VAT Directive: "The taxable amount shall include the following factors: (a) taxes, duties, levies and charges, excluding the VAT itself; (b) incidental expenses, such as commission, packing, trans- port and insurance costs, charged by the supplier to the customer. For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses". However, this is an issue that is outside the scope of this research, because these specific rules are not relevant for the VAT treatment of loyalty schemes and other promotional activities.

242 See, for example, CJEU Cases C-230/87, Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise, ECLI:EU:C:1988:508, paragraph 24, C-38/93, H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst, ECLI:EU:C:1994:188 and C-172/96, Commissioners of Customs & Excise v First National Bank of Chicago, ECLI:EU:C:1998:354, C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 27 and C-283/12, Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite, ECLI:EU:C:2013:599.

243 Cases C-38/93, H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst, ECLI:EU:C:1994:188 and C-172/96, Commissioners of Customs & Excise v First National Bank of Chicago, ECLI:EU:C:1998:354,

244 CJEU Case C-172/96, Commissioners of Customs & Excise v First National Bank of Chicago, ECLI:EU:C:1998:354, par. 32. Also, in the explanatory notes to the Sixth VAT Directive (Explanatory Memorandum to the Proposal for a sixth Council Directive on the harmonization of Member States concerning turnover taxes, Common System of value added tax: Uniform basis of assessment, COM(73) 950, Bulletin of the European Communities, Supplement 11/73, p. 16), the European Legislator explains that an exemption applies to gaming and lotteries because such activities, from a practical perspective, are ill-suited to taxation on a value-added basis.

245 "The Commission states that the nature of VAT explains why "the Second Directive is based generally on 'subjective' value as a criterion for assessment in regard to internal trade". It is in the nature of a tax on consumption which means that it is the actual outlay of the consumer which must be taxed and that it is only when no price has been paid by the consumer that there is cause to adopt the criterion of normal value". CJEU Case 154/80,

As mentioned above, as a general rule, it must be clear from the legal relationship what it is that the price/consideration is paid for.[246] This means that there should not only be a direct link between the payment and the transaction, but that this direct link should be ascertainable from the agreement.[247] This is particularly relevant in cases where more than one good or service is supplied for a single price that is lower than what should normally be paid for the combination and in cases involving voucher schemes, because the VAT treatment of transactions that are performed free of charge differs from the VAT treatment of transactions performed at a discount.[248],[249] Examples are promotional schemes such as 'two products for the price of one', 'buy one, get one free' and the supply of vouchers with a certain quantity of purchases that can be used to obtain goods from a gift catalogue without additional payment. Does the customer also pay (part of) the consideration for the second good that is advertised as being supplied for 'free'? Or for the 'free' vouchers that he receives with his purchases or the goods or services obtained by redeeming them? I will elaborate on how to determine whether a consideration should be allocated to all elements of a composite supply in Chapter 4. The VAT treatment of voucher transactions is discussed in Chapter 9.

It is also clear from the CJEU's Tolsma-case (about an organ player busking in the streets) that performing services for everyone to enjoy, irrespective of whether they paid Mr. Tolsma or not, does not create sufficient reciprocity. In my view it is apparent form this case, even though it was not explicitly mentioned, that in this case it was not possible to 'create' reciprocity by the fact that (and at the moment that) a passer-by decided to pay Mr. Tolsma.

In the Tolsma case, there were not only people that decided to pay Mr. Tolsma, but also people that decided not to. The people that decided not to pay still had the possibility to enjoy or receive the same service (the musical performance by Mr. Tolsma) as the people that did (decide to) pay. Also, the amounts paid were not agreed or advertised, and no direct relation existed between the amounts paid and the 'amount of service received'. Passers-by did not 'agree to pay', they 'decided to pay'.

Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats, ECLI:EU:C:1981:38, under 'Observations of the Commission'.

246 This is also relevant for determining whether a prepayment is considered a consideration for VAT purposes, see inter alia CJEU Case C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:122 and CJEU Case C-270/09, MacDonald Resorts Ltd v The Commissioner for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780.

247 In CJEU case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 30, the CJEU considers that no payment was made for stamps issued to purchasers of certain quantities of fuel since (inter alia), under the sales promotion scheme set up by the business in question, the redemption goods (that could be obtained by redeeming said stamps) were described as gifts.

248 Supplies involving 'rebates' and 'price discounts' are still considered supplies for a consideration and taxed accordingly.

249 Also, according to the CJEU in Case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 17, the terms 'rebates' and 'price discounts' cannot be applied to reductions covering the whole cost of supplying redemption goods.

This is different from, for example, a business that places boxes of candy in offices where people that decide to take candy, have to leave a certain (predetermined or advertised) cash amount, or even from restaurants where people only pay what they think the dinner was worth. In the first of these two examples, it is clear that (if the rules are followed), only people that (implicitly) agree to the rules and pay will receive candy and that only people that take candy have to pay (the advertised amount). In the second of those two examples, a restaurant owner decides to supply restaurant services to a specific (group of) individual(s), excluding others from whom he expects no payment and will not get payment. Payment received from this (group of) individual(s) therefore, in my view, constitutes consideration for the agreed restaurant services. People actually agree to order a meal from the restaurant and they make a payment in return for that agreed supply. In my view, the main difference is that Mr. Tolsma cannot exclude people that don't pay from benefiting from his music.[250] Also, the restaurant guests choose whaf the want to eat, the people listening to Mr. Tolsma play could not decide what they would get to listen to.

If a supplier performs an activity where not everyone that benefits from this activity pays for the supply or in the opposite situation, where not everyone that pays actually benefits from an activity, the link between the payments received and the activity may not be sufficiently direct for the activity to be subject to VAT.[251] However, in my view, the fact that some 'beneficiaries' pay for a supply and others don't, does not always have to mean that no direct link exists. The fact that someone else than the (main) 'beneficiary' of a supply pays for the supply is not such as to affect the direct link between the supply made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria.[252] An example can be a person that pays a bakery to send someone else a cake for their birthday. Even though the person celebrating her birthday physically receives the cake (and can, therefore, be considered the 'beneficiary' of the supply), the person that has the legal relationship with the baker is considered the 'recipient' of the supply (from a VAT perspective). An agreement should be in place with the recipients of the relevant transaction. In these cases, there is still 'a legal relationship pursuant to which there is reciprocal performance', and therefore a supply for consideration.[253]

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250 Deborah Butler, 'The usefulness of the 'direct link' test in determining consideration for VAT purposes', EC Tax Review 3 (2004), p. 92-102, also suggests this on p. 93: "Maybe this requires a supplier of services to be able to prevent any individual who does not pay from benefiting from them. In other words, he should be able to restrict his supplies to paying customers".

251 See, for example, CJEU Case 154/80, Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats, ECLI:EU:C:1981:38 and CJEU Case 102/86, Apple and Pear Development Council and Commissioners of Customs and Excise, ECLI:EU:C:1988:120.

252 See CJEU case C-151/13, Le Rayon d'Or SARL v Ministre de l'Économie et des Finances, ECLI:EU:C:2014:185, paragraph 37 and joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590, paragraph 56.

253 The question whether the 'benificiary' or the contractual party should be considered the recipient of the supply and the question who is allowed to input VAT deduction and to what extent are issues that are separete from the fact that these supplies should be considered to be made 'for consideration'. See for those questions, inter alea, CJEU cases C-185/01 Auto Lease Holland BV v Bundesamt für Finanzen, ECLI:EU:C:2003:73, C-526/13, UAB "Fast Bunkering Klaipėda"" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, ECLI:EU:C:2015:536, C-42/14, Minister Finansów v Wojskowa Agencja Mieszkaniowa w Warszawie, ECLI:EU:C:2015:229 and C-132/16,

The payments received by the supplier should, however, be based on the legal relationship between himself and the other party agreeing to the supply and the payment for there to be a direct link between the supply and the payment (so that the payment is consideration paid in return for the supply). An example of a payment received 'in connection' with a supply but not 'in return' for a supply is a payment received by a supplier of goods or services from a factoring business to whom he has sold all his (current and future) amounts receivable (i.e. the amounts to be received for his supplies, or the ´considerations´ for his supplies). The money received from the factoring company is not paid to him as a result of the agreement between himself and the recipients of his supplies, but as a result of a legal relationship between him and the factoring company. Therefore, no direct link (in the VAT sense) exists between the supplies made to the recipients of the supplies and the payments received by the factoring company. They are, therefore, not 'consideration' for his supplies.[254] The same principle applies to money paid to a supplier by its insurance company as a result of the ´insurance against bad debts´ that the supplier has taken out.[255]

Form the CJEU's Baštová-case,[256] it is clear that two (or more) parties can agree a specific amount that will be paid to one of the parties after that party has 'achieved' a pre-defined goal without that achievement being considered a supply (of goods or services) that is subject to VAT. In the Baštová-case, the agreed achievement was a specific placement in a horse race. Something similar applies to a lottery organisation paying the owner of the winning ticket a certain pre-defined (agreed) prize. In such cases, it is the achievement of a(n un)certain result (the placing of the horse at the end of the race, holding the winning ticket) which, as such, gives rise to the award of (prize) money. Even where the race organiser or lottery business has committed himself to awarding such a prize (e.g. a fixed amount known in advance), the fact remains that the award of the prize is thus subject to a specific occurrence and to a degree of uncertainty. In my view, the outcome of the Baštová-case revolves around the fact that 'winning' or 'achieving a specific placement' is not a supply of goods or services, and therefore any payment received cannot be consideration for that achievement. There is no reciprocal performance where a person is paying someone for achieving a placement in a tournament. That is, in my view, the main reason that both the CJEU and the referring court in the Baštová-case focus on possible actual services provided by the 'contestants' for which the prize money could be

Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683.

254 See, for an explanation as to how this works from a VAT perspective, CJEU cases C-305/01, Finanzamt Groß-Gerau v MKG-Kraftfahrzeuge-Factoring GmbH, ECLI:EU:C:2003:377 and C-93/10, Finanzamt Essen-NordOst v GFKL Financial Services AG, ECLI:EU:C:2011:700.

255 This principle is also applied in practice in the EU. For an example, I refer to the UK HMRC's "VAT Notice 700/18: relief from VAT on bad debts", published on 7 February 2013, accessible online (on 27 August 2017) at https://www.gov.uk/government/publications/vat-notice-70018-relief-from-vat-on-bad-debts/vat-notice-70018-relief-from-vat-on-bad-debts, sections 3.9 – 3.12 and "VAT Notice 731: cash accounting" as updated 24 March 2015 and accessible online at https://www.gov.uk/government/publications/vat-notice-731-cash-accounting/vat-notice-731-cash-accounting, sections 5.3 (Factoring) and 5.4 (Selling Debts).

256 CJEU Case C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855.

consideration. In the Baštová-case, that service could apparently be 'putting a horse at the disposal of the race organiser' (both the referring court[257] and the CJEU[258] consider that option). In my view, the CJEU rightly dismisses the possibility that the prize money can be consideration for 'putting the horse at the disposal of the course organiser'. According to the agreement, or based on the legal relationship, between Baštová (who put horses at the disposal of race organisers by having them compete in races) and the race organiser, the only reason for payment of prize money was the achievement of a predetermined result, where it is uncertain whether that result will be achieved.

However, differences exist between the facts of this case and prize money granted to, for example, lottery winners. In a lottery, people will pay for competing by buying one or more lottery tickets. They pay for the opportunity to compete or, rather, for the chance to win. They do not actually perform any service at all. They are the recipients of a service (taking part in a game of chance). The horse owners do perform an activity by having their horses perform in the race. They have to enter and participate in the race in order to (have a chance to) win. Only by being the best performer will they receive prize money. In that sense, it can be argued that the prize money is payment for a supply of a service, contingent on the result of the service. Under that assumption, the prize money paid to the placed horses (or their owners) can be compared to paying the real estate agent that manages to sell a specific property, where several real estate agents were contracted to provide that service. However, in my view, the object of the agreement between a home owner and one or more estate agents is not just the result, but the entire process (valuating the property, marketing the property by advertising it on line, in a shop window and in brochures, ensuring that flattering photos are taken of the property for promotional use, showing the property to potential buyers and negotiating a price). The 'service' actually provided and agreed between parties is, in my view, not the actual sale but the activities that are aimed at achieving the sale. Without the sale, there is still reciprocal performance (agreed activities in return for payment). The sale, in other words, is the result of the agreed service. If only one real estate agent gets paid because he or she is the one that, in the end, manages to sell the property, the consideration is not paid for the result but for the services provided that have led to that result. The payment of the agreed consideration is contingent on the result. In my view, however, the payment is still consideration for the supply of the services provided, and therefore subject to

257 CJEU Case C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855, par. 25 (Questions 1(a) and 1(b)).

258 CJEU Case C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855, par. 32-40, especially par. 37: "In such a case, on one hand, it is not the supply of the horse by its owner to the race organiser which, as such, gives rise to the award of prize money, but the achievement of a certain result at the end of the race, namely the placing of the horse. Even if the race organiser were to have committed himself to awarding such a prize, of a fixed amount known in advance, the fact remains that the award of the prize is thus subject to a specific performance and to a degree of uncertainty. According to the case-law recalled in paragraph 28 above, that uncertainty precludes the existence of a direct link between the supply of a horse and obtaining a prize".

VAT.[259] This is different from the horses (or horse owners) competing for prize money in the Baštová-case. In that case, in my view, the object of the agreement regarding the payment of prize money is the placement in the race. As I argued earlier in this Section, achieving placement itself is not a service in the sense of VAT. In the Baštová-case, the CJEU states that it is apparent from the Court's case-law that the uncertain nature of the provision of any payment is such as to break the direct link between the service provided to the recipient and any payment which may be received.[260] From this very general assertion, some scholars conclude that situations as I just described, where the payment for an agreed service is contingent on the result of the service, the payment is not consideration in the sense of EU VAT.[261] I disagree, as I will now explain.[262]

In its reference to its own case-law when making the above assertion (i.e. that the uncertain nature of the provision of any payment is such as to break the direct link between the service provided to the recipient and any payment which may be received), the CJEU explicitly mentions the "judgments of 3 March 1994, Tolsma, C-16/93, EU:C:1994:80, paragraph 19, and of 27 September 2001, Cibo Participations, C-16/00, EU:C:2001:495, paragraph 43)". The reference to the Tolsma case concerns the fact that the money received by busking is not a consideration, even though "a musician such as Mr Tolsma solicits money and can in fact expect to receive money by playing music on the public highway. The payments are entirely voluntary and uncertain, and the amount is practically impossible to determine". I consider it relevant that this is not the only ground for the CJEU to consider the money received by Mr Tolsma not to be consideration for his music. (At least) equally relevant is the fact that no legal relationship exists between Mr Tolsma and the people paying him. The CJEU states that "the 'supply of services effected for consideration' (…) does not include an activity consisting in playing music on the public highway, for which no remuneration is stipulated, even if the musician solicits money and receives sums whose amount is however neither quantified nor quantifiable". In my view, the fact that the amount of money received is neither quantified nor quantifiable is a result of the fact that the sums received were not agreed between parties. This is different from the Baštová-case.

The reference to the Cibo case concerns the fact that dividends received by a shareholder are not consideration from a VAT perspective, because "in view, specifically, of the fact that the amount of the dividend thus depends partly on unknown factors and that entitlement to dividends is merely a function of shareholding, the direct link between the dividend and a supply of services, which is

259 In the same sense, see Van Doesum, A. J. (2009), Contractuele samenwerkingsverbanden in de BTW, Deventer: Kluwer, p. 215.

260 CJEU Case C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855, paragraph 29.

261 M.W.C. Soltysik and A.E. Spiessens, De bezwarende titel en onzekere betalingen in de BTW, WFR 2017/44.

262 Also see J.B.O. Bijl, M. Zeegers, No-cure-no-pay-diensten zijn onderworpen aan BTW, WFR 2017/97, where the authors explain why, in their view, contingency fees are consiration for a supply, based on the same arguments as used in this chapter.

necessary if the dividends are to constitute consideration for the services, does not exist even where the services are supplied by a shareholder who is paid dividends (Floridienne and Berginvest, paragraph 23)". Again, the uncertainty regarding the amount of the money received is only part of the grounds for the CJEU to decide that dividends are not consideration for a taxable supply. In other CJEU case law, the court emphasizes the fact that "the mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property".[263] In another case, the CJEU explains why certain features of dividends account, in particular, for their exclusion from VAT: "First, it is not in dispute that the existence of distributable profits is generally a prerequisite of paying a dividend and that payment is thus dependent on the company's year-end results. Second, the proportions in which the dividend is distributed are determined by reference to the type of shares held, in particular by reference to classes of shares, and not by reference to the identity of the owner of a particular shareholding. Lastly, dividends represent, by their very nature, the return on investment in a company and are merely the result of ownership of that property. In view, specifically, of the fact that the amount of the dividend thus depends partly on unknown factors and that entitlement to dividends is merely a function of shareholding, the direct link between the dividend and a supply of services (even where the services are supplied by a shareholder who is paid dividends), which is necessary if the dividends are to constitute consideration for the services, does not exist".[264] As in the Cibo-case above, the CJEU states that no actual service is performed in return for dividends as they result from the mere ownership of the shares. In my view, this is significantly different from the consideration received by a successful real estate agent for selling a property. In that case, as I argued above, an agreed service is performed in return for an agreed consideration, where the payment of the consideration is contingent on the (more or less unpredictable) result of the performance of those services. This means that, despite the fact that the CJEU has indeed made the above assertion, further clarification of this point of law is in my view not required.

As mentioned, as a main rule it should be clear from the agreement exactly what it is that the price/consideration is paid for as well as what the (amount or method of calculating the) consideration is.[265] The term 'clear' is not as strict as it may seem, though. There are situations where, even though the exact (elements that make up the) supply is unknown, the supply still qualifies as a taxable supply, because not exactly knowing what will be supplied is part of the agreement. Examples are the

263 CJEU Case C-60/90, Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen, ECLI:EU:C:1991:268, paragraph 13.

264 CJEU case C-142/99, Floridienne SA and Berginvest SA v Belgian State, ECLI:EU:C:2000:623, paragraphs 22 and 23.

265 This is also relevant for determining whether a prepayment is considered a consideration for VAT purposes, see inter alia CJEU Case C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:122 and CJEU Case C-270/09, MacDonald Resorts Ltd v The Commissioner for Her Majesty's Revenue & Customs ECLI:EU:C:2010:780.

supply of an all-inclusive holiday, a transaction where a customer puts a coin in a capsule vending machine in return for the 'surprise good' in the capsule that comes out or asking a chef in a restaurant to make you a 'surprise dinner' for an agreed amount. These are all examples of transactions where the fact that the 'exact' nature and/or amount of the goods and/or services that are supplied is not known but where this 'unknown factor' is an element of the agreed supply of those unknown goods and/or services. In these situations, a direct link between the payment and the supply still exists.

In some cases, parties involved in a transaction may enter into an agreement to perform a certain transaction for consideration only because they wish the relevant VAT rules to apply to their transaction, whereas the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue.[266] If the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant EU VAT rules, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and it is apparent from a number of objective factors that the essential (or rather, principal, JB)[267] aim of the transactions concerned is to obtain this tax advantage, the transaction may be considered abusive.[268] Abuse of law is outside the scope of this research. I refer to the many publications regarding this subject for further reading. In these cases, the envisaged VAT treatment does not apply, because parties cannot rely on the application of the EU VAT rules where the relevant transaction(s) constitute(s) an abusive practice.[269]

The requirement that the supply has to be sufficiently well defined in the agreement is also relevant for determining whether prepayments (or payments on account) for a future supply of goods or services have VAT consequences, even though prepayments are mainly relevant for determining the tax point and not the nature of the transaction. If, for example, parties agree to the supply of an insufficiently specific amount of goods against a payment that is to be made (well) in advance of the supply, the payment cannot be considered as prepayment for the supply of goods from an EU VAT perspective.[270] This would mean that the tax point for the subsequent supply is not moved forward to the time when the (pre)payment is received, which would be the case if the supply would be sufficiently well defined.[271]

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266 CJEU Case C-425/06, Ministero dell'Economia e delle Finanze v Part Service Srl, ECLI:EU:C:2008:108.

267 This was specifically referred to the CJEU as a question and answered by the CJEU in Case C-425/06, Ministero dell'Economia e delle Finanze v Part Service Srl, ECLI:EU:C:2008:108.

268 CJEU Case C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:121.

269 See, inter alia, CJEU Case C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:121, par. 85.

270 CJEU Case C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:122.

271 Art. 65 of the EU VAT Directive.

It is also possible that certain elements of a transaction are not specified in the agreement covering the transaction, but that it is economic reality that they are still part of the agreement. This is often the case for packaging materials and other elements that are ancillary to the main element(s) of the supply. If a customer goes to a supermarket to buy, for example, sweets, he also purchases the individual wrappers containing the sweets as well as the bag in which the sweets are contained. These packaging materials are not an explicit part of the agreed transaction between the seller and the customer – they will have agreed on the sale and purchase of a certain quantity of specific sweets. The packaging is an implied part of that transaction and is implied to be part of the agreement between supplier and customer. This is, in my view, based on the economic reality of that transaction, in the sense that it is a usual business practice. No part of the total price is, nor should be, allocated to the packaging. I consider the packaging to be a 'dependent ancillary element' to the supply.[272] I define that as an element that it is not explicitly agreed because it is only intended as a means of better enjoying the principal or main supply, but that is still an essential and integral element of the supply. A shop selling wine will not include a separate line item for the bottle on the invoice, nor will it charge the customer separately for it. The same applies to crisps in a bag, sardines in a tin and a soft drink in a can. In many EU Member States, the supply of (non-alcoholic) food and beverages are subject to a different VAT rate than the packaging. That is, however, irrelevant because, as mentioned, I consider the packaging 'dependent ancillary elements' to the supplies described, meaning that often the agreement underlying the sale will not specifically include these elements and that no part of the agreed consideration should be allocated to these elements. However, this does not mean that these elements are provided for free. They are such integral part of the supply that they are absorbed as part of it. I consider the cost of packaging (and other dependent ancillary elements to a supply) to be implicitly included in the price of the products, also from a VAT perspective. This is relevant, because it means that there is no supply 'free of charge' that could trigger VAT consequences.

This approach seems to be supported by the rationale of the EU VAT Directive, where 'incidental expenses' such as packing or packaging are considered to be part of the taxable amount.[273] These provisions apply where the supplier actually charges these expenses to his customer, but they are an indication of the fact that these transactions should not be considered separately (not even when charged separately).

3.3.2.1 Legal relationship entailing reciprocal performance applied to composite supplies

As mentioned above, some supplies are 'composite supplies', meaning that they consist of multiple elements. These composite supplies are often made for one single

272 The concept of a 'dependent ancillary supply' can be found in (the English language version of) three of Advocate General Kokott's (Advocate General to the Court of Justice of the European Union) opinions: Case C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:292, Case C-699/15, Commissioners for Her Majesty's Revenue & Customs v Brockenhurst College, ECLI:EU:C:2016:991 and Case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:283, albeit that she uses it for a concept with a different meaning than I do. However, I feel that the concept covers my point.

273 See Articles 78 ('packing') and 312 ('packaging') of the EU VAT Directive.

consideration. It is not always clear whether this consideration is paid for all elements, or that one or more elements are supplied free of charge. I will discuss composite supplies in Chapter 4.

One of the relevant criteria for determining whether the consideration agreed for a composite supply is paid for all elements of that supply is the legal relationship underlying the composite supply. Above, I argued that certain specific elements of a composite supply should not be treated as separate elements from a VAT perspective. Even though these elements, the 'dependent ancillary supplies', are often not explicitly agreed (crisps and a bag, a soft drink and a can, an ice cream and a tub), I would argue that they are always an element of the composite supply. If they are not specifically agreed, no part of the consideration should be allocated to these elements. This can be different if, for example, some form of elaborate or special packaging is explicitly part of the legal relations (the agreement), e.g. 'biscuits in a decorative tin' or 'tea bags in a decorative wooden display box'. In these cases, other rules apply that I will elaborate on in Chapter 4.

It is also possible that under the agreement for the supply, some elements are specified as being made for consideration and others are specified as being made 'for free'. Examples would be 'buy a ham and get a cutting board and a knife for free' and 'buy this sun blind and we will install it to your house for free'. Even though under the agreed legal relations some of the elements of these composite supplies are made for no consideration, the question arises whether from an EU VAT perspective they should be considered to be made 'for consideration' or not. I will elaborate on that in Chapter 4.

3.3.3 The remuneration has to constitute the value actually given in return for the supply

Based on CJEU case law, the consideration should not only be received in return for a supply, but the remuneration received by the provider of the service should constitute the value actually given in return for the service supplied to the recipient.[274] This does, in my view, not mean that the monetary value of the consideration should be (more or less) equal to the monetary value of the supply for it to qualify as a consideration for VAT purposes, but only that everything that the supplier receives for his supply under the agreement is the consideration, i.e. the subjective value in each specific case and not a value estimated according to objective criteria.[275] I find confirmation of my view on this in an opinion of Mr. Fennelly who, as Advocate General to the CJEU, in the Cooperatieve Aardappelenbewaarplaats-case held that "the use of the word 'subjective' can be confusing but, in my opinion, is intended to exclude any supposed valuation independent of that adopted by the parties to the transaction".[276] I also refer to the opinion of Mr Léger, Advocate General to the CJEU,

274 For example, CJEU Case C-16/93, R. J. Tolsma and Inspecteur der Omzetbelasting Leeuwarden, ECLI:EU:C:1994:80, paragraph 14.

275 See, inter alia, CJEU Case 154/80, Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA, ECLI:EU:C:1981:38, paragraph 13.

276 Opinion of 27 June 1996 in Case C-317/94 Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:255, paragraph 26.

who in the Madgett and Baldwin-case held that "that is an expression of the idea that it is the parties to the contract alone who decide the price which can be charged by reference to the criteria they consider appropriate. It may no doubt be supposed that, out of concern for economic efficiency, they will set prices by reference to objective factors, but the taxable amount cannot be determined on the basis of hypothetical reasonable behaviour. What must prevail is the reality of the economic operation to be taxed".[277] This is what the CJEU, in my view, means when it holds that the payment received is "the real and effective counter-value of the supply".[278] Confirmation of my view can also be found in the CJEU's ruling in the Lajvér case, where it rules that "…It is for the referring court to determine whether the amount of the fee received or to be received, qua consideration, means that there exists a direct link between the services supplied or to be supplied and that consideration, and consequently allows those services to be classified as being effected for consideration. In particular, the referring court will have to ascertain that the fee which the applicants in the main proceedings are planning to charge does not only partly remunerate the services supplied or to be supplied and that its amount has not been determined as a result of other possible factors that could, depending on the circumstances, call into question the direct link between the services supplied and the consideration".[279] The last sentence implies that if the amount received is not only charged/paid to cover (part of) the costs of the supply but has also been determined based on other factors that are not related to the supply, e.g. the fact that only some of the recipients of the activities pay a contribution, the amount of which is based on their income, the payment may not qualify as consideration from a VAT perspective.[280],[281]

Also, in general, the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a 'transaction effected for consideration'. The latter concept requires

277 Opinion of Advocate General Léger in joined Cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise, ECLI:EU:C:1998:182, paragraph 64.

278 CJEU Case C-34/99, Commissioners of Customs and Excise and Primback Ltd, ECLI:EU:C:2001:271, paragraph 24.

279 CJEU Case C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392.

280 CJEU Case C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334, paragraph 33: "The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration".

281 The CJEU also held this in case C-246/09, Commission of the European Communities v Republic of Finland, ECLI:EU:C:2009:671, paragraphs 48 and 49, where it stated that "Although this part payment represents a portio of the feees, its amount is not calculated solely based on the basis of those fees, but also depends on the recipient's income and assets. Thus, it is the level of the latter – and not, for example, the number of hours worked by the public offices of the compexity of the case concerned – which determines the portion of the fees for which the recipient remains responsible. It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the acutal value of the services provided – the more modest the recipient's income and assets, the less strong the link with the value will be".

only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person.[282]

If a supplier receives more than the agreed amount in return for his supply, the additional payment is considered part of the consideration. This can be different if the additional payment is not directly linked to the supply between the 'contracting parties', e.g. personal tips paid to a waiter but not as an added amount to the bill, to be redistributed between the members of the restaurant staff.[283],[284]

As mentioned, the remuneration received by the provider of the supply should constitute the value actually given in return for the service supplied to the recipient. This does not mean that the monetary value of the consideration should be (more or less) equal to the monetary value of the supply for it to qualify as a consideration for VAT purposes, but only that everything that the supplier receives for his supply under the agreement is the consideration, i.e. the subjective value in each specific case and not a value estimated according to objective criteria. Another requirement for a payment to be consideration for a supply is that it should be capable of being expressed in money.[285] In my view, this does not mean that this monetary value must reflect the actual value or fair market value of the consideration, but only that parties have to agree that the consideration has a specifically agreed value and not a 'value estimated according to objective criteria'. Also, the VAT amount due on a supply of goods or services can, as a general rule, only be determined on the basis of a specifically agreed monetary value of the consideration. Only by ensuring that a specifically agreed consideration is paid for a supply, the direct link between the supply and the consideration can be ascertained. Again, this does not mean that no direct link exists when the price (the monetary value of the consideration) does not correspond to the 'economic value' or 'fair market value' of the supply. However, in some cases the difference between the operating costs and the sums received in return for the services offered may suggest that the payment must be regarded more as a fee than as consideration. In those cases, the lack of symmetry means that the supply cannot be regarded as an economic activity within the meaning of Article 9(1) of the EU VAT Directive.[286] I will elaborate on this in Section 3.5.2.

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282 See, to that effect, CJEU Cases 102/86, Apple and Pear Development Council and Commissioners of Customs and Excise, ECLI:EU:C:1988:120, paragraph 12, C-412/03, Hotel Scandic Gåsabäck, ECLI:EU:C:2005:47, paragraph 22; C-285/10, Campsa Estaciones de Servicio SA v Administración del Estado, ECLI:EU:C:2011:381, paragraph 25; C-151/13, Le Rayon d'Or SARL v Ministre de l'Économie et des Finances, ECLI:EU:C:2014:185, paragraphs 36 and 37 and paragraph 45.

283 See, in this sense, the remarks made by Advocate General Mischo in his Opinion regarding Case C-404/99, Commission of the European Communities v French Republic, ECLI:EU:C:2000:651, paragraphs 55 and 56.

284 This is also a published guideline in the UK, see the online version of HMRC's internal manual "VAT supply and consideration", publised on 10 April 2016 and updated on 25 July 2016, section "VATSC56400", Consideration: payments that are not consideration: gratuities, tips and service charges, to be found here: https://www.gov.uk/hmrc-internal-manuals/vat-supply-and-consideration/vatsc56400 (visited on 17 October 2017).

285 See, inter alia, CJEU Case 154/80, Staatssecretaris van Financieën v Coöperatieve Aardappelenbewaarplaats GA, ECLI:EU:C:1981:38, paragraph 13.

286 See, for example, CJEU cases C-246/08, Commission of the European Communities v Republic of Finland, EU:C:2009:671, paragraph 51 and C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334, paragraphs 33 and 34.

I find more confirmation of my view that the monetary value of a consideration does not have to correspond to the monetary value of a supply in the Kennemer Golf-case, where the CJEU ruled that a fixed contribution paid by members of a sports club, which was the same amount irrespective of whether they used the facilities often or not at all, should be considered a consideration.[287] The payment was made for the fact that the sports club makes its facilities available to its members, whether they use them or not. The CJEU considered this sufficient to decide that a direct link existed between the payments and the service provided by the sports club. The CJEU confirmed this view in later cases.[288]

As I explained before, for establishing the direct link between the supply and the agreed consideration it is irrelevant whether the consideration is paid by the recipient of the supply or by another party, e.g. a situation where it is not the recipient of the supply but a 'third party' that pays for (part of) the supply. The price and the supply are still agreed between the relevant parties. The agreed consideration is just (fully or partially) paid by someone else than the recipient. This third party could be a financing company providing (part) of the funding for the transaction, or party that is related to the purchaser and that wishes to (partially) pay the transaction for him or her. As mentioned, the consideration is still received by the supplier in return for the supply made to the recipient, who is the party that he agreed the supply as well as the (amount of the) consideration with. This is different from factoring. Under factoring arrangements, a business that makes supplies for consideration sells (some of) its receivables to a factor, who will normally pay that business less than the actual amount originally invoiced. The payments made by the customers of the business will be made to the factor. The payments by this factor are not consideration for the supplies by the business, because they are based on a separate agreement entailing the transfer and collection of amounts payable. From a VAT perspective, the payment by the business' customer to the factor is (still) considered the actual payment for the supply made by the business to that customer.[289]

The VAT treatment of payments by third parties can be different from the above for certain types of subsidies, where the recipient of the goods or services is unaware of the nature and content (or even existence) of the agreement between the provider of the subsidy and the supplier. Still, a direct link may still exist between the subsidies paid/received and the supplies made by the subsidised business. Even though I will not elaborate on the VAT treatment of subsidies, it is relevant to establish here that one

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287 CJEU Case C-174/00, Kennemer Golf & Country Club v Staatssecretaris van Financiën, ECLI:EU:C:2002:200, paragraph 40.

288 See, for example, CJEU cases C-151/13, Le Rayon d'Or SARL v Ministre de l'Économie et des Finances, ECLI:EU:C:2014:185 and C-463/14, Asparuhovo Lake Investment Company OOD v Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECLI:EU:C:2015:542.

289 For a more detailed description of how factoring works I refer to W.J. Blokland, Omzetbelatingaspecten van ondernemingsfinanciering, Wolters Kluwer 2016, Chapter 7, B.G.A. Heijnen, Niet-betaling in de btw, Wolters Kluwer 2018, Section 4.3.4.4. (both in Dutch) and CJEU Case C-305/01, Finanzamt Groß-Gerau v MKG-Kraftfahrzeuge-Factoring GmbH, ECLI:EU:C:2003:377.

of the criteria to treat a subsidy as subject to VAT is the existence of a direct link between the subsidy and the activity performed by the subsidised taxable person, or the subsidy and the price of the supply.[290] For a comprehensive study on subsidies and VAT I refer to 'Subsidies en BTW in de Europese Unie' (Subsidies and VAT in the European Union, JB) by Van der Paardt.[291]

In conclusion, for a payment made in relation to a supply to be a consideration for that supply, the (amount of the) consideration must be agreed and paid in return for that supply. If the reason for paying (also) has other reasons that the supply, the payment may not be consideration for the supply or at least not the whole amount of the payment.[292] As a general rule, for determining whether a payment is a consideration for a supply it is irrelevant whether the monetary value of the payment corresponds to the monetary value of the supply.

3.4 The 'direct link'-requirement as a prerequisite for a payment to be a 'consideration' from an EU VAT perspective

There has to be a (direct) link between the supply and what is received in return for the supply to be subject to VAT and for the payment to be 'consideration'.[293] An 'indirect link', where a supplier receives payments ('funding') so that it can perform its activities but where no actual price or consideration is stipulated (and charged) for specific supplies, is not sufficient. The ´direct link´ is the essential linking element between a supply and a consideration. This also applies to supplies consisting of multiple elements, where it must be determined whether all elements are supplied for consideration and, for the elements that are supplied for consideration, how the taxable amount for the supply of each element should be determined. I will elaborate on this in Chapter 4.

According to the CJEU's settled case-law, a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the payment received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.[294] This means that the 'direct link' brings together the requirements that I discussed in Sections 3.3.1 and 3.3.3. In the last decade, this 'direct link' was the

290 CJEU Cases C-184/00, Office des produits wallons ASBL v Belgian State, ECLI:EU:C:2001:629 and C-353/00, Keeping Newcastle Warm Limited v Commissioners of Customs and Excise, ECLI:EU:C:2002:369.

291 Dr. R.N.G. van der Paardt, Subsidies en BTW in de Europese Unie, Kluwer (Deventer), 2000, in Dutch with an English summary (pp. 325-328).

292 See, for example, CJEU joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590.

293 See also Deborah Butler, 'The usefulness of the `direct link' test in determining consideration for VAT purposes' (2004) 13 EC Tax Review, Issue 3, pp. 92–102.

294 See, inter alia, CJEU cases C-16/93, R. J. Tolsma and Inspecteur der Omzetbelasting Leeuwarden [1994] ECR I-743, paragraphs 13 and 14, and C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855, par. 28.

focus of many CJEU cases.[295] This direct link, which is a prerequisite for qualifying a supply against payment as a supply made 'for consideration' from an EU VAT perspective, applies to each individual supply or each individual component of a composite supply.

Situations exist where the above direct link is, however, not sufficient to consider the transactions as 'economic activities' from an EU VAT perspective. For activities to be subject to VAT, they need to be economic activities (or, in the words of Article 2 of the EU VAT Directive, they have to be performed by a taxable person acting as such). Supplies that are performed for consideration as referred to in Article 2 of the EU VAT Directive qualify as economic activities if they are performed 'for the purpose of obtaining income therefrom on a continuing basis'.[296] This must be ascertained by evaluating all the specific circumstances of the given case.[297] For determining whether certain transactions qualify as economic activities, the CJEU looks at the type of activity as a whole rather than assessing this per individual activity. This means that if, for example, a person rents out a motor caravan for consideration to her husband as well as to third party lessees, as in the Enkler-case, the whole activity of 'putting the motor caravan at the disposal of other as well as the private use thereof' is tested.[298] The same applies to, for example, a local authority that transported school

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295 See, for example, CJEU Cases C-462/16, Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG, ECLI:EU:C:2017:1006, C-37/16, Minister Finansów v Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Słowno-Muzycznych SAWP (SAWP), ECLI:EU:C:2017:22, C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855, C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392, C-11/15, Odvolací finanční ředitelství v Český rozhlas, ECLI:EU:C:2016:470, C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334, C-463/14, Asparuhovo Lake Investment Company OOD v Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika", ECLI:EU:C:2015:542, C-264/14, Skatteverket v David Hedqvist, ECLI:EU:C:2015:718, C-256/14, Lisboagás GDL - Sociedade Distribuidora de Gás Natural de Lisboa SA v Autoridade Tributária e Aduaneira, ECLI:EU:C:2015:387, C-250/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841, C-174/14, Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública, ECLI:EU:C:2015:733, C-151/13, Le Rayon d'Or SARL v Ministre de l'Économie et des Finances, ECLI:EU:C:2014:185, C-494/12, Dixons Retail plc v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2013:758, C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745, C-283/12, Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite, ECLI:EU:C:2013:599, C-681/11, TVI – Televisão Independente SA v Fazenda Pública, ECLI:EU:C:2013:789, C-549/11, Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – grad Burgas pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v Orfey Balgaria EOOD, ECLI:EU:C:2012:832, C-210/11 and C-211/11, État belge v Medicom SPRL (C-210/11) and Maison Patrice Alard SPRL (C-211/11), ECLI:EU:C:2013:479, C-520/10, Lebara Ltd v Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2012:264, C-106/10, Lidl & Companhia v Fazenda Pública, ECLI:EU:C:2011:526, C-93/10, Finanzamt Essen-NordOst v GFKL Financial Services AG, ECLI:EU:C:2011:700, C-270/09, Macdonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780, C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590, C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, C-267/08, SPÖ Landesorganisation Kärnten v Finanzamt Klagenfurt, ECLI:EU:C:2009:619 and C-246/08, Commission v Finland, ECLI:EU:C:2009:671.

296 See, inter alea, CJEU cases C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352 and C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392.

297 See, inter alea, CJEU case C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, paragraph 24.

298 In CJEU case C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, the CJEU decided that Ms. Enkler did not perform economic activities by doing just that.

children to and from school. In a court case on this topic, the Borsele-case, the facts were that only approximately one third of the parents paid for the transportation of their children, and the money received by these parents covered about 3% of the cost of the transportation services. In this case, the CJEU ruled that these 'transportation activities' as a whole did not qualify as economic activities.[299]

The CJEU did not consider the individual transportation services for which it had actually received payment, or the actual putting at the disposal of a third party of the motor caravan against payment. Instead, as mentioned above, it took into account all the specific circumstances of the case at hand. This can be done, for example, by comparing the circumstances in which the type of transactions under scrutiny with the circumstances under which such supplies are usually performed,[300] the nature of the goods concerned,[301] the number of customers,[302] the amount of earnings,[303] and the lack of symmetry between payments received and costs made for performing a certain activity.[304] All these tests are examples of tests that can be used for determining whether certain activities are indeed performed for the purpose of obtaining income therefrom on a continuing basis. If that is the case, they in principle qualify as economic activities.

The relevant provision in the EU VAT Directive where the transactions that are subject to VAT are listed also requires that for these activities to be subject to VAT, they have to qualify as 'economic activities'. In this provision, these transactions are only subject to VAT if they are performed by a taxable person acting as such.[305] In my view, activities performed by a taxable person acting as such are always economic activities.

3.5 An activity that is subject to VAT has to be performed by a taxable person acting as such

In order for supplies of goods or services[306] to be subject to VAT, they have to be performed by a taxable person acting as such.[307] Therefore, it is relevant to determine 1) who qualifies as a 'taxable person' and 2) under what circumstances that person is 'acting as such'.

299 CJEU case C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334.

300 See CJEU cases C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334, par. 30 and C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, paragraph 28.

301 See CJEU case C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, paragraphs 26 and 27, in which the CJEU explains that by this it means whether goods are capable of being used for both economic as well as private (non-economic) activities.

302 CJEU case C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, paragraph 29.

303 CJEU case C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, paragraph 29.

304 CJEU case C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334, par. 34.

305 This does not apply to the importation of goods and certain intra-Community transactions.

306 And most intra-Community acquisitions.

307 See Article 2 of the EU VAT Directive.

3.5.1 Taxable person

According to the EU VAT Directive, 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.[308] Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity. The CJEU has consistently ruled that for any activity to be considered an 'economic activity', the purpose of the activity should be obtaining income therefrom on a continuing basis (i.e. by not performing the activities only on an occasional basis), and that this does not only apply to the exploitation of tangible or intangible property.[309]

As a general rule, every person performing economic activities qualifies as a taxable person independently. However, each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.[310] This type of 'composite' taxable person is usually referred to as VAT group. The allocation of resources and financial means within a VAT group are not subject to VAT. Because the concept of a VAT group is not relevant for this research, I will not further elaborate on this concept or its VAT consequences.

3.5.2 Acting 'as such' (as a taxable person)

In order for activities as performed by a taxable for consideration to be subject to VAT, the activities have to be performed by the taxable person acting 'as such'. This means that not all activities as performed by taxable persons, even if performed for consideration, are subject to VAT. This has been consistently confirmed by the CJEU.[311] The CJEU has ruled that it is not necessary for a taxable person acting in a certain field of activity, that (other) transactions that he occasionally carries out have to fall within the same field of activity. However, for these activities to be subject to VAT, they will still have to qualify as 'economic activities' on their own accord.[312] This means that the taxable person will have to perform these activities for the purpose of obtaining income therefrom on a continuing basis, as mentioned before. In my view, this means that, as an example, a self-employed lawyer (a taxable person) that sells

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308 See Article 9 of the EU VAT Directive.

309 See, for example, CJEU cases C-263/15, Lajvér Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV), ECLI:EU:C:2016:392, paragraphs 31-33 and C-62/12, Galin Kostov v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, , ECLI:EU:C:2013:391, paragraph 30.

310 See Article 11 of the EU VAT Directive.

311 See, for example, CJEU cases C-291/91, Finanzamt Uelzen v Dieter Armbrecht, ECLI:EU:C:1995:304, paragraphs 18 and 24 and C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334. In the latter case, Gemeente Borsele (the Dutch municipality of Borsele) qualifies as a VAT taxable person for some of its activities, as is confirmed by the fact that it has a valid VAT identification number (NL 001598752B01). For the transportation of school children, even though it received payment, it was not considered to be 'acting as a taxable person'.

312 See, for example, CJEU Case and C-62/12, Galin Kostov v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECLI:EU:C:2013:391, paragraphs 28 and 29.

his daughters bicycle because it has become too small, is not acting 'as such' (i.e. in his capacity of taxable person) when selling that bicycle, unless he sells bicycles (and/or other goods) on a sufficiently regular basis for these activities to be considered 'economic activities' by themselves.

In order to be considered a taxable person, the person has to – independently – perform economic activities. As I already described above, 'economic activities' (as defined in Article 9 of the EU VAT Directive) and 'transactions that are subject to VAT' (as defined in Article 2 of the EU VAT Directive) are not the same. I will now elaborate a bit further on the EU VAT concept of 'economic activities'.

3.5.3 Economic activities

Economic activities are all activities performed by a taxable person acting as such.[313] However, not all economic activities are transactions that are subject to VAT, and not all transactions that are subject to VAT are economic activities.

Examples of economic activities that are not considered transactions that are subject to VAT, which can be found in the EU VAT Directive as well as in CJEU case law, are:

- the supply of goods and services outside the EU for consideration by a taxable person acting as such;
- holding shares in a subsidiary where that subsidiary is managed (but not for consideration) and where these activities entail other taxable activities,[314]
- the purchase of goods or services for the purpose of providing taxable transactions,[315]
- the transfer of a going concern in specific cases,[316]
- transaction within one single taxable person (e.g. within a VAT group or between a head office and its branches),[317]
- the issuing of shares[318] and
- certain transactions for no consideration.[319]

313 This can be concluded from Article 9(1), second and third paragraph, EU VAT Directive.

314 CJEU Case C-142/99, Floridienne SA and Berginvest SA v Belgian State, ECLI:EU:C:2000:623, paragraph 19.

315 CJEU Cases C-268/83, D.A. Rompelman en E.A. Rompelman-van deelen, te Amsterdam, and Minister van financiën, ECLI:EU:C:1985:74 [1985] ECR 655, paragraph 22 and C-110/94, Intercommunale voor zeewaterontzilting (INZO) v Belgian State, ECLI:EU:C:1996:67, paragraphs 20 and 21.

316 CJEU Case C-408/98, Abbey National plc v Commissioners of Customs & Excise, ECLI:EU:C:2001:110, paragraphs 35 and 36 (implicitly). Articles 19 and 29 of the EU VAT Directive stipulate that in the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods or services has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor. In my view this means that without these provision, these transfers would be taxable transactions. Application of the provisions makes these transactions no longer taxable – they are, however, still economic activities.

317 CJEU Case C-210/04, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v FCE Bank plc, ECLI:EU:C:2006:196, paragraph 42 and 43.

318 CJEU Case C-465/03, Kretztechnik AG v Finanzamt Linz, ECLI:EU:C:2005:320, paragraph 24 and 25.

319 The application of goods forming part of his business assets free of charge, as samples or as gifts of small value, by a taxable person (Article 16 of the EU VAT Directive).

As I described in Section 3.4, examples of transactions that qualify as 'subject to VAT' but that are not economic activities are the supply of goods or services under conditions that are different from ´normal´ market conditions.[320] Other examples of non-economic activities that can be performed by a taxable person (but not acting as such with regard to these activities) are the 'passive' holding of shares in subsidiaries (i.e. not entailing any other activities)[321] and the issuing new shares.[322]

Other examples of non-economic activities are transactions performed by non-taxable persons or by bodies governed by public law under the special legal regime applicable to them,[323] and transactions that are subject to a total legal prohibition on importation and marketing in the entire EU (as performed by any person), such as the supply of narcotics.[324]

In this section I have established what constitutes an economic activity. Economic activities can be either subject to VAT or not. I have summarised the above in the two diagrams below, where the left diagram shows the types of activities as performed by businesses, and the diagram on the right show how these activities are categorised for EU VAT purposes. The red section in the diagram on the right side represents activities for consideration that are, nonetheless, not considered economic activities from an EU VAT perspective:

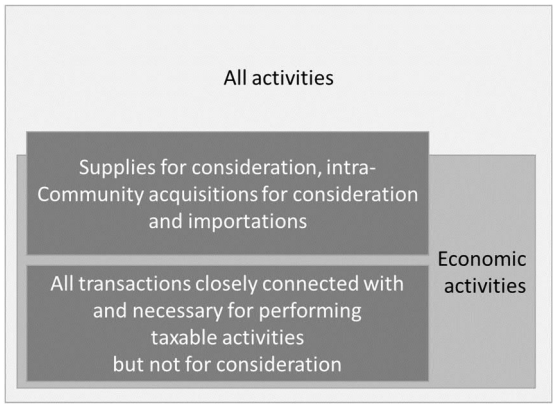
320 See CJEU Cases C-246/08, Commission v Finland, ECLI: EU:C:2009:671 and C-520/14, Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele, ECLI:EU:C:2016:334.

321 See CJEU Case C-142/99, Floridienne SA and Berginvest SA and Belgian State, ECLI:EU:C:2000:623.

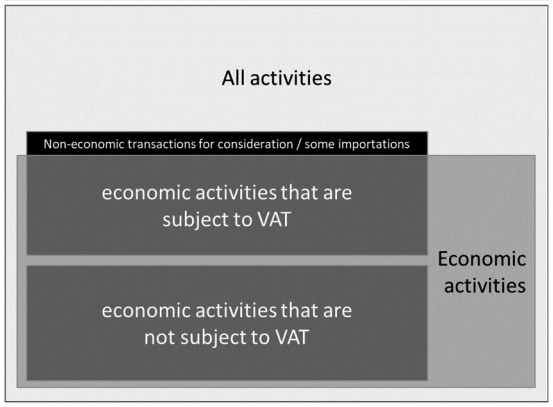
322 CJEU Case C-465/03, Kretztechnik AG v Finanzamt Linz, ECLI:EU:C:2005:320.

323 See CJEU Case C-4/89, Comune di Carpando Piacentino and Others and Ufficio provinciale imposta sul valore aggiunto di Piacenza, ECLI:EU:C:1990:204.

324 CJEU Case C-289/86 , Vereniging Happy Family Rustenburgerstraat, Amsterdam, and Inspecteur der Omzetbelasting, Amsterdam, ECLI:EU:C:1988:360.



and



The red box in the second schedule denotes the supplies that are made for consideration (i.e. supplies that are subject to VAT) but that are not economic activities, as described above.

Transactions that are (deemed to be) performed outside the EU are never subject to VAT. They can, however, qualify as economic activities). In Section 3.6 I will briefly touch upon the requirement for transactions to be made 'within the territory of an EU Member State' to be subject to VAT.

3.6 The activity has to be performed within the territory of a Member State

Because the purpose of VAT is taxation of expenditure for local consumption, transactions have to take place within the territory of a Member State to be subject to (local) VAT. This does not mean that transactions that are performed by taxable persons that are established in the EU but that take place outside the EU are not considered economic activities. This is clear from the fact that in the EU VAT Directive, the provisions regarding VAT deduction allow deduction of VAT incurred on costs of goods or services insofar as these goods or services are used for economic

activities that are performed outside the Member State where the tax deduction is applied.[325]

The territory of a Member State means the territory of each Member State of the Community (now: Union, JB) to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty,[326] with the exception of Mount Athos in Greece, the Spanish Canary Islands as well as the municipalities of Ceuta and Melilla, the French overseas departments, the Finnish Åland Islands, the British Channel Islands, the German Island of Heligoland as well as the territory of Büsingen and the Italian municipalities of Livigno and Campione d'Italia and the Italian waters of Lake Lugano.[327]

The EU VAT Directive contains several provisions for determining where a transaction is deemed to take place (the 'place of supply rules'). Only if a transaction is deemed to be made within the territory of a Member State under these rules, the transaction can be subject to VAT in that EU Member State.

3.7 Other provisions in the EU VAT Directive affecting taxability

Some other, specific, provisions in the EU VAT Directive determine whether a transaction is subject to VAT or not.

Some provisions deal with taxable transactions that are not subject to VAT as a result of these provisions. The most relevant ones deal with:

- transactions between separate legal entities that are considered one taxable person for VAT purposes (a VAT group) (Article 11 of the EU VAT Directive); and
- the transfer of a totality of assets or part thereof ("transfer of a going concern" or TOGC) (Articles 19 and 29 of the EU VAT Directive);

Other provisions deal with transactions that are not taxable due to the absence of a consideration. Under these provisions, the transactions are deemed to be performed for consideration. The provisions that are most relevant for this research deal with:

- the application of business assets for consumptive purposes free of charge (Article 16 of the EU VAT Directive);
- the use of business assets for consumptive purposes free of charge (Article 26 of the EU VAT Directive); and
- the transfer of business assets from one EU Member Sate to another EU Member State (Article 17 of the EU VAT Directive).

I will elaborate on the second group, the 'deemed taxable transactions', in Chapter 6.

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325 Article 169(a) of the EU VAT Directive.

326 Replaced by Articles 52 of the Treaty of the European Union (TEU) and 349 of the Treaty on the Functioning of the Eurpean Union (TFEU), Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 326 , 26/10/2012 P. 0001 - 0390.

327 See Articles 5 and 6 of the EU VAT Directive.

3.8 Requirements for transactions to be subject to VAT derived from CJEU case law

The provisions in the EU VAT Directive under which certain transactions are deemed to be made for consideration, or not subject to VAT, are not the only source for this type of treatment of transactions. In this section, I will examine the relevant CJEU case law on this topic. Because this research focuses on the VAT treatment of voucher transactions, loyalty schemes and other incentives, I will only focus on cases where a taxable person acting as such supplies goods or services or makes an intra-Community acquisition for payment within the territory of a Member State. Based on CJEU case law, some specific situations exist in which no economic activities are performed, even though all the requirements that I just mentioned are met.
The following requirements have been developed by the CJEU:

a) there has to be consumption;[328] and
b) the transaction should not be subject to a total legal prohibition on importation and marketing in the EU;[329]and
c) transactions should not be effected within the same legal entity, e.g. between a head office and its branch, and
d) they should not qualify as certain specific transactions concerning contractually agreed shares.[330]

I will elaborate in this now.

3.8.1 No consumption, no taxation

The CJEU has ruled that there is no taxable supply of goods or services if there is no consumption as envisaged in the Union VAT system, for instance if the person paying the consideration does not acquire goods or services for its own use but acts in the common interest.[331] In those circumstances, the transaction does not entail any benefit that would enable the person paying the consideration to be considered a consumer of a supply. The transaction in question does not therefore constitute a taxable supply. The CJEU later specified that for an undertaking to be covered by the common system of VAT it must indeed imply consumption. If an undertaking does not entail for identifiable persons any benefit that would enable them to be considered to be consumers of a service, its transaction cannot be classified as a supply within the meaning of the EU VAT Directive.[332]

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328 See CJEU Case C-215/94, Juŕgen Mohr and Finanzamt Bad Segeberg, ECLI:EU:C:1996:72.

329 CJEU Case C-289/86, Vereniging Happy Family Rustenburgerstraat, Amsterdam, and Inspecteur der Omzetbelasting, Amsterdam, ECLI:EU:C:1988:360.

330 CJEU Case C-77/01, Empresa de Desenvolvimento Mineiro SGPS SA (EDM), formerly Empresa de Desenvolvimento Mineiro SA (EDM) and Fazenda Pública, ECLI:EU:C:2004:243.

331 See CJEU Case C-215/94, Juŕgen Mohr and Finanzamt Bad Segeberg, ECLI:EU:C:1996:72, paragraphs 19-22,

332 See CJEU Case C-384/95, Landboden-Agrardienste GmbH & Co. KG and Finanzamt Calau, ECLI:EU:C:1997:627, paragraphs 20 and 24.

3.8.2 A total legal prohibition on importation and marketing in the EU

The CJEU has decided on several occasions that even if a supply is made within the territory of a Member State, for consideration by a taxable person acting as such, this supply cannot be subject to VAT if that transaction is subject to a total legal prohibition on importation and marketing in the EU. Examples of such transactions from CJEU case law are:

- Importation and sale of illegal drugs;[333] and
- Importation of counterfeit currency.[334]

The reason that the CJEU provides for keeping these transactions to be outside the scope of VAT is as follows: the EU VAT Directive is based on Articles 99 and 100 of the EEC Treaty and its objective is the harmonization or approximation of the legislation of the Member States on turnover taxes 'in the interest of the common market'. Since the harmfulness of narcotic drugs is generally recognized, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes. Such drugs are, therefore, wholly alien to the provisions of the EU VAT Directive and, in consequence, to the provisions on the origination of a turnover tax debt.[335]

This means that as soon as there is some form of competition with legal goods or services, illegal transactions regarding the supply goods or services are (also) subject to VAT. Examples of these kind of transactions as found in CJEU case law are:

- the exportation of specific goods to specific countries (e.g. software to former Eastern bloc countries);[336]
- the supply of counterfeit perfume products;[337]
- the organisation of unlawful games of chance;[338] and
- the importation of contraband ethyl alcohol.[339]

3.8.3 Transactions within the same legal entity

Even though transactions within the same legal entity can be economic activities, they are not subject to VAT, unless the applicable rules explicitly subject these transactions to VAT. An example of services performed within the same legal entity, in this case

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333 See CJEU Cases C-294/82, Senta Einberger v Hauptzollamt Freiburg, ECLI:EU:C:1984:81, C-269/86, W. J. R. Mol v Inspecteur der Invoerrechten en Accijnzen, CLI:EU:C:1988:359and CJEU Case 289/86, Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting, ECLI:EU:C:1988:360.

334 See CJEU Case C-343/89, Max Witzemann v Hauptzollamt München-Mitte, ECLI:EU:C:1990:445.

335 See CJEU Case 289/86, Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting, ECLI:EU:C:1988:360, paragraphs 16 and 17.

336 See CJEU Case C-111/92, Wilfried Lange v Finanzamt Fürstenfeldbruck, ECLI:EU:C:1993:345.

337 See CJEU Case C-3/97, Criminal proceedings against John Charles Goodwin and Edward Thomas Unstead, ECLI:EU:C:1998:263.

338 See CJEU Case C-283/95, Karlheinz Fischer v Finanzamt Donaueschingen, ECLI:EU:C:1998:276.

339 See Case C-455/98, Tullihallitus v Kaupo Salumets and others [2000] ECR I-5003.

between a head office and its foreign branch, can be found in CJEU Case law.[340] Under the EU VAT Directive, the transfer of business assets from one EU Member State to another EU Member State is deemed to be an (intra-Community) supply followed by an intra-Community acquisition of those same goods.[341] The same provisions apply when these goods are transferred from a head office to its foreign branch. The transfer of own goods to a (branch established in a) destination outside the EU is not considered to be a transaction that is subject to VAT, since there is no 'underlying' supply of goods (transfer of the right to act as owner) nor a provision that requires this transfer to be treated as a supply for consideration, as is the case with the intra-EU cross-border transfer of own goods.

3.8.4 Some specific contractually agreed shares

Specific situations exist where operations are carried out which correspond to a contractually assigned share to each of the parties to a specific contract and which are not paid for. These transactions do not constitute a taxable transaction. In the relevant CJEU case law, an example of such operations is the performing of contractually agreed operations under a 'consortium contract'. In this situation, it seems that the consortium itself is considered the taxable person and the contractually agreed operations are treated as internal transactions within that taxable entity.[342] Where the performance of more of the operations than the share thereof fixed by the said contract for a party to that contract involves payment by the other parties against the operations exceeding that share, those operations constitute a supply of goods or services 'effected for consideration' within the meaning of the EU VAT Directive.[343]

3.9 Summary – transactions that are subject to VAT and economic activities

Supplies of goods and supplies of services are only subject to VAT if performed for consideration by a taxable person acting as such, within the territory of a Member State. They have to be economic activities to be within the scope of VAT. Some supplies are subject to VAT even if they are not performed for consideration. Other transactions are not considered supplies that are subject to VAT, even though they are performed for consideration by a taxable person. This can be because the taxable person is not acting ´as such´ or because the activities do not qualify as economic activities.

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340 See CJEU Case C-210/04, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v FCE Bank plc, ECLI:EU:C:2006:196.

341 See Articles 17 and 21 of the EU VAT Directive.

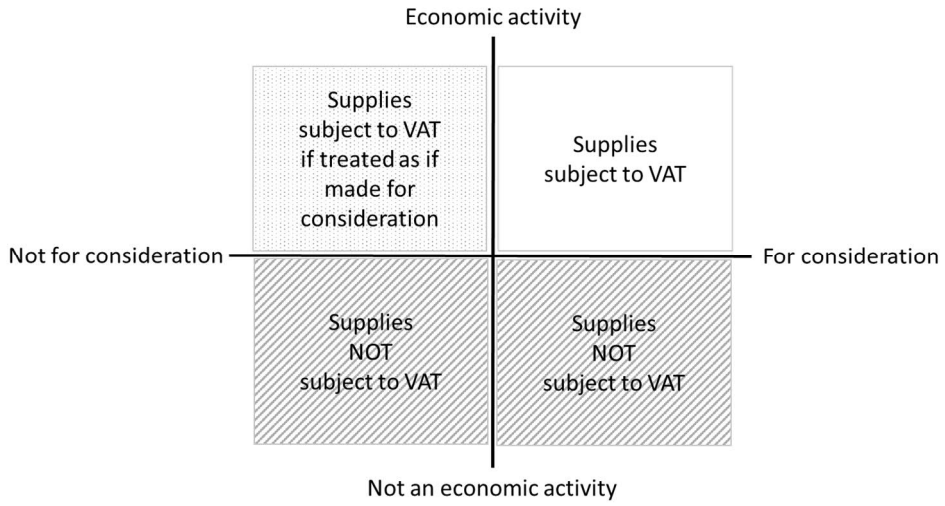
342 Also see A.J. van Doesum, Contractuele samenwerkingsverbanden in de btw, Kluwer Fiscale Monografieën, No 133, section 19.4.3.4. (only available in Dutch, with an English summary).

343 CJEU Case C-77/01, Empresa de Desenvolvimento Mineiro SGPS SA (EDM), formerly Empresa de Desenvolvimento Mineiro SA (EDM) and Fazenda Pública, ECLI:EU:C:2004:243, paragraph 88-89.

Transactions that are subject to VAT and economic activities

For a supply of goods or services to be subject to VAT, the supply has to be based on a legal agreement between the supplier and the recipient. The supply has to be made for consideration, which also has to be based on the legal agreement. There has to be a direct link between the supply and the payment, meaning that the consideration received by the supplier is the real and effective counter-value of the supply.

Under the relevant EU VAT rules certain supplies that are not made for consideration can still be subject to VAT. These transactions are treated as if they were made for consideration. As mentioned before, this mechanism only applies to supplies made free of charge that are economic activities.[344] This can be visualised in the below diagram, where the horizontal axis represents whether a transaction is made for consideration or not, and the vertical axis represents whether the supply qualifies as an economic activity. Only two out of the four quadrants contain supplies that are or that can be subject to VAT:



In Chapter 6 I will examine the VAT treatment of making supplies free of charge, and in Chapter 4 I will examine the VAT treatment of composite supplies.

344 See CJEU Cases C-515/07, *Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën*, ECLI:EU:C:2009:88 and C-400/15, *Landkreis Potsdam-Mittelmark v Finanzamt Brandenburg*, ECLI:EU:C:2016:687, paragraph 30.

4 VAT treatment of composite supplies

In this Chapter, I will describe the VAT treatment of composite supplies. Composite supplies are single supplies that consist of multiple elements, which can be either goods, services or both.

I will explain how these multiple element supplies can be categorized from a VAT perspective, and what this means for the VAT treatment of such supplies and their individual elements. Understanding the different types of composite supplies from a VAT perspective is a first step in determining whether a consideration paid for a composite supply is actually paid for all elements of that composite supply.

As with the Chapter on transactions that are subject to VAT (Chapter 3), this Chapter is part of the steps that need to be taken in order to determine whether a supply, or an element of a composite supply, is made 'free of charge'. The aim of these steps is to establish what the VAT treatment is of supplies that are made free of charge, since free supplies are a species of promotional activities that can be performed through the use of vouchers.

Some vouchers are 'given away for free' together with a supply of goods or services that is made for consideration. It can be argued that the EU VAT rules regarding composite supplies should also apply to transactions involving vouchers. If a free SPV[345] is provided together with a good, it could be argued that the SPV, embodying the supply of the goods or services to which that SPV relates and which are deemed to be supplied at the time of transferring the SPV, is not an aim in itself for the customer, but a means of better enjoying the main supply. If that is the case, the SPV is 'absorbed' by that main supply and, as a general rule, (part of) the consideration for that main supply should also be allocated to the supply of the SPV.[346] The VAT treatment of free vouchers is different from vouchers that were issued or transferred for consideration. In this Section, all these issues are discussed.

4.1 Main rule for composite supplies: all elements of a transaction should be considered separately

As I explained in Chapter 2, the concept of 'economic reality' can be used for determining the VAT treatment of a transaction. Economic reality has been used by the CJEU as a concept in rulings that can be categorised in different groups, according to the actual issue that was referred to the CJEU. One of these categories are the cases about multiple-element transactions, where it uses the 'economic viewpoint' for determining whether a multiple-element supply comprises a single transaction that, from an economic point of view, should not be artificially split. The economic angle is, therefore, a relevant factor.

According to the CJEU, when considering multiple-element transaction, the 'main rule' is to regard every element of that transaction as distinct and independent. This means

345 An SPV is a Singe Purpose Voucher – for the VAT treatment of transactions involving SPVs, see Section 9.5.2.

346 See Section 4.2.1.1 below.

that, as a main rule every element must be considered separately. The CJEU formulated this as early as in 1986, when it stated that "(…) this view corresponds with the aim of the Sixth directive. (…) in order to render tax non-discriminatory from the point of view of competition, the Directive is intended to make separate taxable transactions which cannot be grouped together in a single transaction individually liable to VAT".[347]

According to the CJEU, it follows from the EU VAT Directive that every supply must normally be regarded as distinct and independent and, second, that a supply which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. For this purpose, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.[348] Even though I have not been able to find any explicit wording in either the Explanatory Memorandum to the Sixth EU VAT Directive[349] or its predecessor, the Second Directive,[350] in my view it makes sense that in order not to distort the functioning of the VAT system, every supply must normally be regarded as distinct and independent because the VAT treatment of a supply is determined by the nature of that supply. That is why the nature of each good supplied and service rendered must also be detailed on invoices for VAT purposes.[351] Only if specific circumstances dictate this can two or more separate supplies be considered one single, composite supply, as I will explain in Section 4.2.

The fact that under the EU VAT rules, a special arrangement exists for services usually performed by tour operators (the tour operator margin scheme or TOMS) also confirms that, from an EU VAT perspective, every supply should be regarded as distinct and independent as a main rule.[352] Under this TOMS-arrangement, the transactions made by a travel agent in respect of a journey shall be regarded as a single supply.[353] This rule was set up specifically because the application of the normal VAT rules would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations.[354] In my view, this confirms that the 'normal VAT rules'

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347 CJEU Case C-73/85, Hans-Dieter and Ute Kerrutt v Finanzamt Mönchengladbach-Mitte, ECLI:EU:C:1986:295, par. 14.

348 CJEU Case C-349/96, Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise, ECLI:EU:C:1999:93, par. 29. This rule is repeated in almost all subsequent CJEU case law on this topic.

349 Proposal for a sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950, Bulletin of the European Communities, Supplement 11/73.

350 Proposal for a second Council directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added, COM(65)144, Supplement to the Bulletin of the European Economic Community No. 5, 1965.

351 See Art. 226(6) of the EU VAT Directive.

352 See Artt. 306-310 of the EU VAT Directive.

353 Art. 306 of the EU VAT Directive.

354 CJEU joined cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise, ECLI:EU:C:1998:496, par. 18.

require businesses to, as a main rule, consider each element of a multiple-element transaction separately.

As mentioned above, the aim of this section is to determine whether all elements of a composite supply are made for consideration. In order to determine whether a supply is made for consideration, the first step is to determine whether the supply is a separate, distinct supply and as such made for consideration, or whether the supply is part of a multiple-element transaction that is made for consideration.

If a supply is not part of a multiple-element transaction, it is easier to determine whether that single transaction was made for consideration or not, because if there is a consideration, it does not have to be allocated to different elements of the transaction. If no consideration is paid/received for the single supply, it is made for free.

However, if a supply is part of a multiple-element transaction, the second step is to determine whether the total consideration paid (or received) is attributable to each element of the composite/mixed supply. If no part of the total consideration paid/received for the multiple-element transaction can be (or should be) attributed to one or more elements of the supply, then this element/component is supplied free of charge.

4.1.1 Is the supply part of a multiple-element transaction?

Whether a supply is part of a multiple-element transaction is usually easy to establish. A multiple-element transaction is a transaction where more than one supply (of goods or services) is made under the agreement regarding that transaction. This means that all elements should be explicitly included in the agreement.[355] This is different for what I refer to as 'dependent ancillary elements', such as packaging materials (see Chapter 4).

Examples of multiple-element transactions are: the supply of a telecommunications services package with a telephone, an all-inclusive holiday, the supply of a bicycle including the agreed servicing of a bicycle after six months of use and the supply of an agreed number of future updates with the supply of a standard software package.

As mentioned, in my view, for a supply to be considered part of a multiple-element supply, the element must be part of the agreement regarding the multiple-element supply. If, for example, all visitors to a store are offered a free gift, irrespective of whether they make a purchase or not, and if, after paying for a purchase at the checkout, a paying customer receives such a free gift, I do not consider this gift to be part of the earlier (multiple-element) transaction. The same applies, in my view, to a situation where all people purchasing petrol at a chain of petrol stations are offered tokens that they can save to obtain free gifts if they have saved a sufficient amount of tokens.[356] Even though there is obviously some form of legal agreement between the

[355] See Chapter 3.

[356] The CJEU ruled a case on these facts, with the same result: case C-48/97, Kuwait Petroleum (GB) and Commissioners of Customs & Excise, ECLI:EU:C:1999:203.

purchasers of the petrol that accept the tokens and the chain of petrol stations, the tokens are in my view not 'part of the agreement' regarding the supply of the petrol. The tokens are offered but people have a choice not to accept them. The price of the petrol is not dependent on whether or not purchasers of the petrol accept the tokens or vouchers. The vouchers are not mentioned on the invoice for the purchase of the petrol. Therefore, these vouchers are not an element included in a multiple-element supply, but rather a separate supply that is made conditional to the supply of the petrol but not included in it. It is not part of the supply, but rather the result of it. Note that the supply of the token(s) is not the (end) purpose of the people accepting them. That would be the goods or services obtained when the tokens are redeemed. I will elaborate on this in Chapter 9.

The above reasoning is based on relevant VAT (related) rules. It is also possible to look at multiple-element supplies from a different angle: the relevant accountancy rules.

4.1.2 Accountancy rules and VAT

Taxation is a legalised way[357] of achieving economic and financial objectives.[358] Therefore, taxation can be looked at from a legal, an economic as well as an accounting perspective.[359] Not only is accountability relevant in any tax system,[360] some of the accountancy rules are also a standardised and regulated way of establishing the nature or character of a transaction. After all, financial statements should reflect a true and fair view of the business affairs of an organisation.[361] Therefore, I will also investigate the accountancy rules that are relevant for this purpose (i.e. identifying the nature or character of a transaction). The accountancy approach to transactions can also be seen as the application of (a form of) 'commercial and economic reality'.

4.1.2.1 A very brief introduction into accounting standards

Two relevant major international accounting (or financial reporting) systems exist: the

357 The Treaty on the Functioning of the EU (TFEU), under Article 113, specifically provides for the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, to adopt provisions for the harmonisation of Member States' rules in the area of indirect taxation (principally Value Added Tax and Excise Duties) because indirect taxes may create an immediate obstacle to the free movement of goods and the free supply of services within an Internal Market. EU VAT legislation is based mainly on directives. A directive is binding upon each Member State to which it is addressed, but leaves the choice of form and methods to the national authorities who transpose it into national legislation. Currently, the main piece of legislation is the EU VAT Directive.

358 See, for example, the Study on reduced VAT applied to goods and services in the Member States of the European Union, Final report written by Copenhagen Economics, 21 June 2007, D(2008) 33113 – EN, available on-line on http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_13_en.pdf , last accessed on 21 February 2019.

359 See, for example, Sijbren Cnossen, A Primer on VAT as Perceived by Lawyers, Economists and Accountants, Tax Notes, August 17, 2009, p. 687-698.

360 See, for example, Governance, Taxation and Accountability: Issues and Practices, OECD, DAC Guidelines and Reference Series, 2008.

361 Clifford Gomez, Auditing and Assurance: Theory and Practice, New Delhi (India), 2012, p. 262.

International Financial Reporting Standards (IFRS)[362] and the Generally Accepted Accounting Principles (GAAP).

IFRS is created by the International Accounting Standards Board (IASB), which is the independent standard-setting body of the IFRS Foundation, whose rules apply to all EU listed companies.[363,364] Other companies and jurisdictions apply IFRS as well.

GAAP (for the USA, also US GAAP) is created by the Accounting Standards Codification of the Financial Accounting Standards Board (FASB), which is the single official source of authoritative, nongovernmental generally accepted accounting principles (GAAP) for the USA.[365]

Even though this research focusses on EU VAT rules, I will examine the principles of both accounting standards, because they provide relevant insights into a possible way of determining 'economic reality'. Since this section represents a step in the process of determining whether a supply is made for consideration and what the VAT treatment is of a supply that is not made for consideration, I will focus on the accountancy rules that deal with these concepts. Because supplies made free of charge are not made for consideration, it could be helpful to examine the rules about allocating revenue to specific elements of a multiple-element transaction. These are the accountancy rules for 'revenue recognition'.

4.1.2.2 'Consideration' (a VAT concept) and 'revenue' (as an accounting concept)

Revenue is a crucial concept to users of financial statements in assessing an entity's financial performance and position. However, revenue recognition requirements in IFRS differ from those in U.S. GAAP, and both sets of requirements need improvement. Therefore, the IASB and the FASB initiated a joint project to clarify the principles for recognizing revenue and to develop a common revenue standard for IFRS and U.S. GAAP. The standard should take effect in 2017, although it hadn't at the time of finalising this document (February 2019).[366]

In my view, the rules for revenue recognition could be useful for determining the nature or character of a transaction and, therefore, its VAT consequences as well.

The proposed rules for 'Revenue from Contracts with Customers' should apply to all entities that enter into contracts with customers unless these contracts are in the

362 Sometimes still called International Accounting Standards (IAS), but IAS has officially been changed to IFRS in 2001, when the International Accounting Standards Board (IASB) took over from the International Accounting Standards Committee (IASC).

363 Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards - OJ L 243, 11 September 2002

364 For more information about the IASB, and IAS, please visit the IFRS website on www.ifrs.org, last visited on 21 February 2019.

365 For more information about the FASB, and U.S. GAAP please visit the FASB website on www.fasb.org, last visited on 21 February 2019.

366 Information about the joint Revenue Recognition project of the IASB and the FASB can be found on the websites of both organisations.

scope of other standards (e.g. insurance contracts or lease contracts).[367] The core principle of the proposed requirements is that an entity should recognise revenue to depict the transfer of (promised) goods or services to customers in an amount that reflects the consideration to which the entity expects to be entitled in exchange for those goods or services.[368] This is very similar to the EU VAT rules on determining the taxable amount for a supply of goods or services: '(…) everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply (…)'.[369] Therefore, as I maintained above, it could be useful to compare the accountancy rules regarding revenue recognition with the EU VAT rules for the purpose of determining the VAT treatment of supplies of goods and services, e.g. whether there is a single (composite) supply or whether the supply consists of several distinct elements and how the consideration should be apportioned to the various elements of a supply. The CJEU has also accepted certain accounting principles from IASB as relevant for determining the VAT treatment of (certain) transactions.[370]

The first step in determining what elements in a multiple-element transaction are made for consideration (and, therefore, at the same time, which elements are not) is determining which elements are actually included in a multiple-element transaction.

4.1.2.3 Accounting rules for determining whether a supply is made for consideration

Revenue is a crucial concept for users of financial statements in assessing an entity's financial performance and position. The primary issue in accounting for revenue is determining when to recognise revenue.[371] For the purpose of revenue recognition, revenue must be measured,[372] transactions must be identified, and revenue must be allocated to the relevant transactions.[373]

Revenue recognition requirements in International Financial Reporting Standards (IFRSs) differ from those in US generally accepted accounting principles (US GAAP). US GAAP comprises broad revenue recognition concepts and numerous requirements for particular industries or transactions that can result in different accounting for economically similar transactions. Although IFRSs have fewer requirements on revenue recognition, the revenue recognition standard most relevant for this research, IAS 18 Revenue, can be difficult to understand and apply. In addition, IAS 18 provides limited guidance on important topics such as revenue recognition for multiple-element arrangements.[374]

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367 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, November 2011, p. 6.

368 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, November 2011, p. 7.

369 Article 73 of the EU VAT Directive.

370 CJEU Case C-118/11, Eon Aset Menidjmunt OOD v Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECLI:EU:C:2012:97, par. 38.

371 International Accounting Standard 18 (Revenue), International Accounting Standards Committee, 1993, p. 1.

372 International Accounting Standard 18 (Revenue), International Accounting Standards Committee, 1993, par. 9-12.

373 International Accounting Standard 18 (Revenue), International Accounting Standards Committee, 1993, par. 13.

374 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, par. IN1.

At the time of conception of this Section of my research, the proposed new rules regarding revenue recognition were not yet applicable (earlier application of the proposed rules is not allowed for entities that fall under the FASB rules[375] but is allowed for the entities that apply the IASB rules[376]). Therefore, I have also included an elaborate description of the rules as applicable before 1 January 2017 (the date on which the proposed rules were supposed to come into effect). Even though the current rules as set out by the two regulatory bodies differ and because they are not always completely clear, I have chosen to elaborate on these (current) rules to provide an insight in how the question of determining whether a 'free' supply is actually a free supply is answered from a current accounting perspective.

I will start with the proposed new rules. From a (proposed, see Section 4.1.2.4) accounting perspective, I consider the following two steps most relevant for this research, because these are similar to the two steps taken under the EU VAT rules for determining whether a transaction is made for consideration, and for determining how to allocate the total consideration to the various elements of the transaction (I will elaborate on that in Section 4.6).

The first step is designed to decide whether the free elements of a supply may be considered separate supplies. For this purpose, first it has to be determined whether the 'free' supply is made as part of an existing contract or not. If the 'free' supply is part of an existing contract, part of the overall consideration should be allocated to it, which means that the supply is never actually 'free' from an accounting perspective. If the 'free' supply is not part of an existing contract, no part of the consideration paid for the agreed supply can be allocated to it, making it a real 'free' supply from an accounting perspective.

The second step is designed to decide what part of the transaction price should be allocated to the relevant separate supplies that form the composite supply. For this purpose, the calculations should be relatively straightforward and intuitive.

4.1.2.4 Proposed joint IASB/FASB rules for accounting for free products

As mentioned in Section 4.1.2.1, the result of the project initiated by the IASB and the FASB to clarify the principles for recognizing revenue and to develop a common revenue standard for IFRSs and U.S. GAAP should have taken effect in 2017.[377,378]

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375 FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 41, paragraph 131 (Effective date and transition).

376 Appendix C (Effective date and transition) to IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 65, par. C1.

377 Information about the joint Revenue Recognition project of the IASB and the FASB can be found on the websites of both organisations.

378 In 2012, the Staff of the US Securities and Exchange Commission (SEC) published a Report in which is, essentially, a Work Plan for the Consideration of Incorporating International Financial Reporting Standards into the Financial Reporting System for U.S. Issuers. The full report can be found online at http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-final-report.pdf, last visited on 21 February 2019.

The core principle of the proposed joint accounting rules is that an entity should recognise revenue to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which the entity expects to be entitled in exchange for those goods or services. To achieve that core principle, an entity would apply all of the following steps:

Step 1–Identify the contract with a customer.
Step 2–Identify the separate performance obligations in the contract.
Step 3–Determine the transaction price.
Step 4–Allocate the transaction price to the separate performance obligations in the
contract.
Step 5–Recognise revenue when (or as) the entity satisfies a performance obligation.[379]

For this research, I consider Step 3 and Step 5 to be less relevant. Step 5 deals with the timing of revenue recognition, which falls outside the scope of this research. Also, the result of Step 3, determining the transaction price, is not relevant for determining whether a contract consists of one (composite) transaction or various different supplies or whether the consideration received should be allocated to all transactions (and how).

Step 1 is interesting for this research in the sense that it demonstrates that the transactions to which the relevant rules apply, are defined in a similar way as under the 'legal' approach of the EU VAT rules. Therefore, I will examine Step 1 and Step 2 now to determine whether these can be useful for determining which elements are included in a multiple-element transaction.

I will compare Steps 1 and 2 with the EU VAT rules before I examine Step 4. Step 4 will be examined as part of 'economic and commercial reality' in Section 4.5.2.2 in this Chapter.

Step 1: Identify the contract with a customer

Under the relevant rules, a contract is defined as an agreement between two or more parties that creates enforceable rights and obligations. Contracts can be written, oral or implied by an entity's customary business practices.[380]

Step 2: Identify the separate performance obligations in the contract

A performance obligation is a promise in a contract with a customer to transfer a good or service to the customer. If an entity promises to transfer more than one good or service, the entity would account for each promised good or service as a separate performance obligation only if it is distinct. If a promised good or service is not distinct, an entity would combine that good or service with other promised goods or

379 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 7 (IN 9-IN10). The same information that is included in this publication can be found in FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012.

380 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 7 (IN11).

services until the entity identifies a bundle of goods or services that is distinct. In some cases, that would result in an entity accounting for all the goods or services promised in a contract as a single performance obligation.

A good or service is distinct if either of the following criteria is met:
(a) the entity regularly sells the good or service separately; or
(b) the customer can benefit from the good or service either on its own or together with other resources that are readily available to the customer.

Notwithstanding those criteria, a good or service in a bundle of promised goods or services is not distinct and, therefore, the entity would account for the bundle as a single performance obligation, if both of the following criteria are met:
(a) the goods or services in the bundle are highly interrelated and transferring them to the customer requires that the entity also provide a significant service of integrating the goods or services into the combined item(s) for which the customer has contracted; and
(b) the bundle of goods or services is significantly modified or customised to fulfil the contract.[381]

It is clear from the above that under the relevant accountancy rules, elements have to be promised or agreed in a contract to be considered part of a multiple-element supply. This implies that also from an accounting perspective, the legal agreement between parties should be leading when determining whether a multiple-element transaction should be considered a single, composite supply or several separate supplies. In Section 4.5.2.2, I will investigate some more accounting rules for determining whether the consideration received for a multiple-element supply should be allocated to all elements of that transaction.

Economic reality, or the 'economic viewpoint', is used by the CJEU for determining whether a multiple-element supply comprises a single transaction that, from an economic point of view, should not be artificially split. Under the 'economic' accounting rules, multiple-element supplies should be considered one single, composite, supply only if the elements, or promised goods or services, are 'distinct'. Looking at the rules for determining whether a promised good or service is distinct, accounting rules use economic criteria rather than legal criteria as well.

4.2 Multiple-element transaction as a single, composite supply for VAT

The VAT treatment of a multiple-element transaction where each element should be considered a separate supply is fairly straight forward. The nature of each separate element should be established in order to apply the correct VAT treatment to that element. This becomes more challenging for multiple-element supplies where the transaction as a whole should not be split.

381 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 7-8 (IN 12-IN 14).

A supply which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system.[382] This implies that the 'legally agreed' separate elements of a composite supply may have to be considered a single, composite, supply if the 'economic reality' requires so. Also, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service. I've described the 'typical customer' in Section 2.6.3. The CJEU itself has acknowledged on several occasions that it is impossible to give exhaustive guidance on how to determine whether a composite transaction should be considered one single supply or multiple supplies.[383]

4.2.1 Different types of single, composite supplies

In my view, only two types of composite transactions, i.e. multiple-element transactions that are considered one single supply from a VAT perspective, exist where the nature of the 'composite transaction' determines the VAT treatment of that transaction. The first type is a transaction where the 'main' transaction determines the VAT treatment of the 'ancillary supplies', which can be symbolised as follows:

A + b = A

The second type is where the supply should not be split because of the strong economic links without one of the elements absorbing the other(s). This type of composite supply can be symbolised as follows:

A + B = C

I will elaborate on both types of composite transactions now.

4.2.1.1 Absorption

Some supplies can be considered ancillary to other transactions (the 'principal transactions'). These transactions do not constitute for customers an aim in itself, but a means of better enjoying the principal transactions provided by the supplier.[384]

Under the rules as laid down by the CJEU, this can be the case for transactions that take up a small proportion of the total price compared to the principal transaction or that can be carried out without a substantial effect on the total price charged and

382 CJEU Case C-349/96, Card Protection Plan Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1999:93, par. 29.

383 See, for example, CJEU case C-94/09, European Commission v French Republic, ECLI:EU:C:2010:253, par. 32.

384 For examples of CJEU cases where one or more 'ancillary' supplies were absorbed by a 'main' supply, see joined cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel (Case C-308/96), and between T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise (Case C-94/97), ECLI:EU:C:1998:496 and case C-349/96, Card Protection Plan Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:93.

where these transactions are transactions 'traditionally' performed by the provider and should not go beyond the transactions 'traditionally' provided by the provider.

An example of such ancillary services is any help-line offered as a support where customers have questions or need specific help with regard to the ('main') goods and/or services they purchased. It can also be argued that in some cases, the transportation of goods purchased on-line should be considered ancillary to the supply of the goods, since the transportation is not an aim in itself for the customer, but a means of making on-line shopping possible. This could be different if a specific price is agreed for extra fast delivery, because then it can be argued that speed of delivery, or added convenience, has become an aim in itself for the customer.

The fact that a single price is charged is not considered decisive by the CJEU, although if the supply consists of several elements for a single price, the single price may suggest that there is a single supply.[385]

Even though in the English language, the terms 'ancillary' and 'incidental' are not the same, in provisions and case law where these separate terms are used in English, other language versions contain words for both that are the same or very similar.[386] A similar 'blended' use of the terms 'ancillary' and 'incidental' can be found in the English language version of the EU VAT Directive: where certain 'incidental' transactions are excluded from the calculation of the deductible proportion,[387] these exact same transactions are excluded from calculating a reference amount for the purpose of applying a specific arrangement if they are 'ancillary' transactions.[388]

Does this mean that, for determining whether some supplies should be 'absorbed' into other supplies, the CJEU case law concerning the explanation of the concept of 'incidental' is also relevant? In my view, the answer to this question is 'no'. Based on the Explanatory Memorandum to the Sixth EU VAT Directive[389] as well as the relevant

385 CJEU case C-349/96, Card Protection Plan Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:93, par. 31.

386 The English "ancillary services" in CJEU Case C-349/96, Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise, ECLI:EU:C:1999:93, paragraph 30 and "incidental transactions" in CJEU Case C-77/01, Empresa de Desenvolvimento Mineiro SGPS SA (EDM), formerly Empresa de Desenvolvimento Mineiro SA (EDM) and Fazenda Pública, ECLI:EU:C:2004:243, paragraph 2, are translated as "prestaciones accesorias" and "operaciones accesorias" in Spanish, "prestations accessiores" and "operations accessiores" in French, "prestazioni accessorie" and "operazioni accessorie" in Italian and "prestações acessórias" and "operações acessórias" in Portuguese. In Dutch: "bijkomende diensten" and "bijkomstige handelingen".

387 Article 174 of the EU VAT Directive.

388 Article 288 of the EU VAT Directive.

389 Document COM(73) 950, 20 June 1973, Proposal for a Sixth Council Directive in the harmonization of legislation of the Member States concerning turnover taxes, Common system of value added tax: uniform basis of assessment, as submitter by the Commission of the European Communities to the Council of the European Communities on 29 June 1973, Bulletin of the European Communities, supplement 11/73, p. 19.

CJEU case law,[390] the criteria relevant for determining whether a transaction should be considered 'incidental' are:

- the scale of the income generated by the transactions in relation to the total turnover of the business may be an indication that those transactions should be regarded as incidental;
- the fact that income is generated by such transactions is greater than income produced by the activity stated by the undertaking concerned to be its main activity does not suffice to preclude their classification as 'incidental transactions'; and
- if the transactions are not part of the usual business activity of the taxable person, this may be an indication that these transactions are 'incidental'.

These criteria can, in my view, not all be applied one-on-one for determining whether a transaction is 'ancillary' to another transaction in the sense of 'subordinate' and 'not an aim in itself, but a means of better enjoying the main transaction'.

Absorption requires the ancillary supply to be a 'means of better enjoying the principal supply'. A towel or a DVD supplied by a petrol station to loyal customers are, in my view, not means of better enjoying the supply of the petrol. In fact, they have nothing to do with the enjoyment/actual use of petrol. If the petrol station would supply plastic gloves for free to protect the hands of the customers when they fill up their vehicles with petrol, the supply of this glove is, in my view, an example of the supply of a 'means of better enjoying the principal supply'.[391] I would argue that the same applies to the free use of the facilities in the petrol station as well as the free use of the squeegee for cleaning the vehicle's windows, since these 'supplies' are all connected to or related to the original supply and can be considered 'means of better enjoying the principal supply'. Free gifts such as the towel or the DVD in the above example are supplies that make the purchase of the main supply 'more enjoyable' in the sense of making it 'more attractive' to make that specific purchase. However, they are not meant to facilitate the purchaser in the sense better enjoying the main supply. The French and German language versions of the relevant CJEU case law are clearer on this point. A literal translation of the relevant section of the French cases would be 'a means of benefiting from the main supply under the optimal conditions'[392]. A translation of the relevant part of the German language version is 'a means for

390 See, for example, CJEU cases C-306/94, Régie Dauphinoise - Cabinet A. Forest SARL v Ministre du Budget, ECLI:EU:C:1996:290 and C-77/01, Empresa de Desenvolvimento Mineiro SGPS SA (EDM), formerly Empresa de Desenvolvimento Mineiro SA (EDM), and Fazenda Pública, ECLI:EU:C:2004:243.

391 I would argue that this is not a 'dependent ancillary supply' because the customer can choose not to take the plastic glove.

392 See the French language version of CJEU joined Cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise, ECLI:EU:C:1998:182, paragraph 24 (" … le moyen de beneficier dans de meilleures conditions du service principal de cet operateur").

consuming the main supply under optimal conditions'.[393] In my view, presents for loyal customers are also not 'one' with the main supply from an economic point of view. It would, in the words of the CJEU, not be 'artificial' to split these supplies and the functioning of the VAT system would not be distorted by splitting them.[394]

The above implies, in my view, that the relevant elements should be 'functionally connected' to the main supply in order to be absorbed into the main supply because they are ancillary to it. This view is supported by the fact that absorption is a species of cases where, according to the CJEU, there is a multiple-element supply that comprises a single transaction from an economic point of view.[395]

4.2.1.2 Amalgamation

The other 'form' or 'species' of multiple-element transactions that are considered a single, indivisible economic supply, which it would be artificial to split, is based on two or more elements in a transaction where none of those transactions is considered ancillary to the other.[396] This is the case where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.[397] Those elements should not only be inseparable, but must also be placed on the same footing, or at least both be indispensable in carrying out the supply as a whole, with the result that it is not possible to take the view that one must be regarded as the principal element and the other as ancillary to it.[398] In a number of cases concerning amalgamation, the CJEU makes clear that this doctrine applies to cases where considering the different elements as separate and individual would be artificial or contrived.[399] It should be clear from the totality of elements that they are

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393 See the German language version of CJEU joined Cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and T.P. Madgett and R.M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise, ECLI:EU:C:1998:182, paragraph 24 ("… sondern stellen das Mittel dar, um die Hauptdienstleistung dieses Wirtschaftsteilnehmers unter optimalen Bedingungen in Anspruch zu nehmen").

394 CJEU case C-349/96, Card Protection Plan Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1999:93, paragraph 29.

395 CJEU case C-349/96, Card Protection Plan Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1999:93, paragraph 29.

396 For examples of CJEU cases where two or more elements of a mixed supply formed the 'assembly blocks' of a new, single, composite supply 'sui generis', see CJEU cases C-41/04, Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:292, C-111/05, Aktiebolaget NN v Skatteverket, ECLI:EU:C:2007:195, C-572/07, RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem, ECLI:EU:C:2009:365, C-461/08, Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën, ECLI:EU:C:2009:722, C-88/09, Graphic Procédé v Ministère du Budget, des Comptes publics et de la Fonction publique, ECLI:EU:C:2010:76 and C-44/11, Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG, ECLI:EU:C:2012:484.

397 CJEU case C-41/04, Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:292, par. 22.

398 CJEU case C-44/11, Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG, ECLI:EU:C:2012:484, par. 27.

399 See CJEU cases C-111/05, Aktiebolaget NN v Skatteverket, ECLI:EU:C:2007:195, paragraph 25 ("…without undue contrivance…"), C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649, paragraph 24 ("…without entering the realms of the artificial…") and C-461/08, Don Bosco

all closely linked and that together, they are all necessary for achieving the economic purpose of the entire (composite) transaction, where the separate elements are of no economic use individually, but together constitute an economically useful supply.[400] The concept of 'economic' in these cases means 'a reflection of the way a business transaction is normally conducted as perceived by a typical customer', as I explained before.

An objective close link is required for transactions to form (part of) a single economic transaction. This means that all elements of the supply made by the supplier should be taken into account to establish whether they, together, form one single, indivisible economic supply. I take the term 'economic' to mean the 'actual' supply, which can be different from (and even opposite to) what is 'legally agreed' (see above).[401]

The way in which prices for these (individual) transactions are stipulated is not of itself decisive.[402] The result of this amalgamation is a 'new' supply 'sui generis' (i.e. with its own distinct features and nature), whose VAT consequences should be based on the nature of this single, amalgamated supply.

The rules as laid down by the CJEU regarding absorption and amalgamation as described above imply that the VAT treatment of such composite transactions is determined by the nature of the single, composite supply. This VAT treatment can, for example, concern the application of a VAT rate,[403] the application of an exemption[404] or the application of the place of supply rules.[405]

4.2.2 The 'concrete and specific'-test: more rules from the CJEU?

There has been a lot of discussion and disputes around the question whether different elements to a single, composite supply, can have their own VAT treatment, even though only one (composite) supply is made. CJEU case law was interpreted in such a

Onroerend Goed BV v Staatssecretaris van Financiën, ECLI:EU:C:2009:722, paragraph 39 ("…without undue contrivance…").

400 This is an amalgamation of CJEU cases C-111/05, Aktiebolaget NN v Skatteverket, ECLI:EU:C:2007:195, paragraph 25, C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649, paragraph 24 and C-461/08, Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën, ECLI:EU:C:2009:722, paragraph 39.

401 Compare the first paragraph of the judgment in CJEU Case C-255/02, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:121.

402 CJEU case C-41/04, Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:292, par. 25.

403 CJEU Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09, Finanzamt Burgdorf (C-497/09), Finanzamt Burgdorf (C-497/09) v Manfred Bog, CinemaxX Entertainment GmbH & Co. KG, formerly Hans-Joachim Flebbe Filmtheater GmbH & Co. KG, (C-499/09) v Finanzamt Hamburg-Barmbek-Uhlenhorst, Lothar Lohmeyer (C-501/09) v Finanzamt Minden, and Fleischerei Nier GmbH & Co. KG (C-502/09) v Finanzamt Detmold, ECLI:EU:C:2011:135.

404 CJEU Case C-349/96, Card Protection Plan Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1999:93.

405 CJEU case C-41/04, Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:292.

way that if an element to a composite supply constituted a 'concrete and specific aspect' of that composite supply, this aspect could have its own VAT treatment.[406]

The CJEU cases that were interpreted as allowing separate VAT treatment of 'concrete and specific' elements to a single, composite supply (Commission v France and Talacre Beach Caravan Sale) hinge specifically and explicitly upon the right of a Member State to apply multiple VAT consequences to a single supply in cases where these Member States had a right, and not an obligation, to apply the VAT consequence that differs from the standard VAT treatment. In both cases, the Member States required taxable persons to apply these multiple VAT treatments to a single, composite supply. Other elements of the supply were (explicitly) excluded from this specific VAT treatment. Taxable persons seemed not to have a choice in the matter. In both cases, the CJEU ruled that the Member States had the right to require exactly that of taxable persons performing those transactions within their jurisdictions.

This was confirmed by the CJEU in the Stadion Amsterdam-case, a case about a guided tour through a football stadium, that ended in the football club's museum, where the taxpayer argued that at least part of the service (granting entry to a museum) qualified as VAT exempt. The CJEU disagreed. It held that "… a single supply, such as that at issue in the main proceedings, comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of value added tax, must be taxed solely at the rate of value added tax applicable to that single supply, that rate being determined according to the principal element, even if the price of each element forming the full price paid by a consumer in order to be able to receive that supply can be identified".[407] This ruling ended the discussion about treating 'concrete and specific elements' to a composite supply separately. It is now clear that this can only be done in exceptional cases, determining whether the selective application of a reduced rate of VAT complies with the relevant EU VAT rules.[408]

4.3 Multiple-element supplies made by multiple suppliers

As a general rule, supplies made by separate taxable persons that are acting as such cannot be considered a single, composite supply (either through absorption or amalgamation).[409] In my view this makes sense, because the different taxable persons should be liable for the VAT treatment and the VAT consequences of their own

406 See CJEU cases C-94/09, Commission v France, ECLI:EU:C:2010:253 and CJEU case C-251/05, Talacre Beach Caravan Sales, ECLI:EU:C:2006:451 and Christian Amand, Vakstudie Highlights & Insights on European Taxation (H&I) 2010/7.17, comments by Amand.

407 CJEU case C-463/16, Stadion Amsterdam CV v Staatssecretaris van Financiën, ECLI:EU:C:2018:22.

408 CJEU case C-463/16, Stadion Amsterdam CV v Staatssecretaris van Financiën, ECLI:EU:C:2018:22, paragraph 34.

409 See, for example, CJEU case C-425/06, Ministero dell'Economia e delle Finanze v Part Service Srl, ECLI:EU:C:2008:108.

supplies. It is hard to imagine that a supply made by one supplier is not considered an aim in itself, but a means of better enjoying a supply made by another supplier. This is confirmed in CJEU case law, where one of the main tests for establishing whether a multiple-element transaction should be considered one single, composite supply or not is whether the relevant elements can be performed by a third party.[410]

Separate legal entities performing separate supplies can perform a composite supply from a VAT perspective if they are part of a VAT group under Article 11 of the EU VAT Directive, because then they are considered a single taxable person.[411]

The only instance that I have come across, where separate taxable persons that do not present themselves to (potential an existing) customers as a single entity can jointly perform a single, composite transaction is under an 'agreement to jointly make supplies' (in Dutch: 'partage overeenkomst'). However, this Dutch interpretation of the VAT rules may not be fully in line with the EU VAT system.[412]

This means that in my view, where separate businesses make joint supplies, these supplies should always be considered separate taxable transactions and treated as such from a VAT perspective.

4.4 Multiple-element supplies made consecutively?

Can supplies that are not made at the same time be considered a single, composite supply, or do these supplies have to be made at the same time? Based on the relevant CJEU case law, there seems to be a difference between supplies that are considered one through absorption and supplies that are considered one through amalgamation.

4.4.1 Absorption

Composite supplies that are considered one single supply through absorption consist of a 'main' supply and one or more 'ancillary supplies' that are not aims in themselves but means of better enjoying the main transaction. For these ancillary supplies to be absorbed into a main supply, there must be a temporal connectedness between these transactions. There is no clear answer from CJEU case law, but the Muys' en De Winter case seems to suggest that timing is relevant.[413] In that case, interest charged in relation to the payment of interest on deferred payments. The CJEU decided that where this deferment was granted until delivery, the interest did not constitute

410 See, for example, C-572/07, RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem, ECLI:EU:C:2009:365, paragraph 22.

411 In the same sense: I. Massin and K. Vyncke, BTW-eenheid : opletten met 'gebundelde' prestaties, Fiscoloog 1153, 25 March 2009, p. 5.

412 For an elaborate view on this, see Van Doesum, A. J., Contractuele samenwerkingsverbanden in de BTW, Kluwer, Deventer, 2009, Chapter 22.

413 CJEU case C-281/91, Muys' en De Winter's Bouw- en Aannemingsbedrijf BV v Staatssecretaris van Financiën, ECLI:EU:C:1993:855.

consideration for the grant of credit, but part of the consideration obtained for the main supply. However, if payment was deferred after the supply, the interest received would be considered consideration for a grant of credit. It seems that the CJEU considers the first situation as an absorbed supply, but it does not explicitly mention this. This would mean that only a combination of agreed transactions that coincides can be considered one single transaction through absorption. In my view, it makes sense to only absorb ancillary supplies into a main supply where they coincide.

This is relevant for the EU VAT treatment of vouchers, because under the EU VAT rules, issuing a so-called 'Single Purpose Voucher' or SPV[414] shall be regarded as a supply of the goods or services to which the voucher relates.[415] This means that if an SPV is issued with the supply of a good or a services, irrespective of whether the SPV is issued for free, the supply of the goods or services to which the voucher relates could be considered ancillary to the 'main' supply if the relevant criteria are met.

4.4.2 Amalgamation

CJEU case law seems to indicate that for amalgamation, the supplies that are considered a single, indivisible economic supply, which it would be artificial to split can be supplied consecutively. This makes sense, because, for example, a specific service could be required to transform a good into a different, new product, as in the Levob-case.[416] Obviously, the consecutive transactions have to still be 'connected', but they don't have to coincide. In some cases, they cannot even coincide, as I just explained. In these cases, if one of the transactions is performed using a voucher, this should not affect the possibility to consider the supplies as one, through amalgamation.

4.5 Is the consideration paid for a composite supply, paid for all elements?

In my view, the rules for determining whether a composite supply should be treated as the supply of every individual element (the 'main rule') or as the single, composite sum of its components (through absorption or amalgamation) are also relevant for determining whether the total consideration paid for a multiple-element transaction should be allocated to all elements of the composite supply. It can be argued that, as a result of the absorption or amalgamation, the separate elements no longer exist as such (from a VAT perspective) and that therefore the consideration can only be attributed to the single, composite supply.[417] This is different for 'main rule' composite supplies, where each individually supplied element has its own VAT consequences.

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414 For an elaborate exploration of the VAT treatment of vouchers, see Chapter 9.

415 Article 30b of the EU VAT Directive.

416 CJEU case C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649.

417 As explained, this is different in specific cases where a concrete and specific constituent element of the supply has a different VAT treatment from the single composite supply that it is a part of. However, this does not affect the outcome of my research and therefore I will not further elaborate on this.

4.5.1 A single, composite supply where one or more elements are advertised as supplied 'for free' – economic and commercial angle

In Chapter 3, I determined that a supply is made for consideration if it is based on a legal relationship between the supplier and the customer, where there is a direct link between the payment and the supply. Can there be a direct link between a payment and part of a supply that is agreed not to be made for consideration? At first sight, that seems somewhat implausible.

However, elements of a multiple-element transaction that are agreed to be supplied for no consideration, but that are no longer considered separately for VAT purposes because of absorption or amalgamation are, in fact, not supplied as such[418] and therefore, in my view, not supplied for free, irrespective of the advertised opposite position taken. CJEU case law makes clear that all elements of a single, composite supply follow the same VAT treatment as the composite supply as a whole.[419] Separate elements are no longer recognized as such.

No CJEU case law exists where the concept of 'economic reality' as such was used for deciding whether part of the consideration for a multiple-element transaction should be apportioned to the element(s) of that transaction that are advertised as 'free'. However, the concept of economic reality supports the view that none of the elements of an amalgamated or absorbed multiple-element transaction are supplied for free if a consideration is paid for the composite supply, even if one or more of those elements is advertised or offered as being 'free of charge'. 'Economic and commercial reality' should, in my view, be based on the purport or aim of the agreement between the parties, separate from the way in which that agreement is put into wording/writing.[420] This 'economic and commercial reality' dictates that if elements of a single, composite supply that, from a VAT perspective, no longer 'exist' as such, either through absorption into the main element or through amalgamation into a new, single, supply, are advertised as being supplied 'for free' and where the total composite supply is made for consideration, these elements are not supplied for free from a VAT perspective.

In practice, many supplies that are made as part of a 'multiple element supply' will not be absorbed or amalgamated into another supply. As mentioned, absorption requires the supply to be a 'means of better enjoying the principal supply'. As an example, (a voucher that can be redeemed for) a towel or a DVD supplied by a petrol station to loyal customers are not means of better enjoying the petrol. In fact, they have nothing to do with the enjoyment/actual use of petrol. These free elements (the towel and the DVD) in the above example are not meant to facilitate the purchaser in better enjoying

418 That is, from an EU VAT perspective.

419 See CJEU case C-463/16, Stadion Amsterdam CV v Staatssecretaris van Financiën, ECLI:EU:C:2018:22.

420 In the same sense, see CJEU case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409.

the main supply. It would not be 'artificial' to split these supplies and the functioning of the VAT system would not be distorted by splitting them.[421] I will discuss the VAT treatment of these types of composite supplies, where one or more of the elements that, from a VAT perspective, are supplied 'as separately recognized elements to a composite supply', and that are advertised as being supplied 'free of charge', in the next section below.

4.5.2 Economic and commercial reality applied to other composite supplies where one or more elements are advertised as supplied 'for free'

When considering a multiple-element transaction, the 'main rule' is to regard every element of that transaction as distinct and independent. This means that, as a main rule, if one (or more) element(s) to a multiple-element transaction where all elements should be regarded as distinct and independent is advertised as (and supplied for) free, that element is indeed supplied for no consideration. In this section, I will examine this 'main rule' in the light of 'economic and commercial reality'.

In Chapter 3 I described that for a supply of goods or services to be subject to VAT, the supply has to be based on a legal agreement between the supplier and the recipient. The supply has to be made for consideration, which also has to be based on the legal agreement. There has to be a direct link between the supply and the payment, meaning that the consideration received by the supplier is the real and effective counter-value of the supply.

With regard to the question whether certain specific elements to a multiple-element supply are supplied for consideration, I will focus on the legal relationship or the legal agreement on which the supplies are based. If, based on the legal agreement, an element is deemed to be supplied free of charge, I will then examine whether 'economic and commercial reality' can affect that conclusion. As mentioned before, economic reality only becomes a relevant factor if it is not a proper reflection of the 'legal reality'.[422]

4.5.2.1 The legal agreement regarding specific elements to a multiple-element supply is generally leading

As mentioned before, for determining the VAT treatment of a multiple-element transaction, as a main rule, every element of the transaction should be treated as distinct and separate. In my view, this main rule should also be applied when determining whether the consideration received for a multiple-element transaction must be allocated to certain elements. This means that if, in a multiple-element transaction, some elements are agreed to be made for consideration and one or more

421 CJEU case C-349/96, Card Protection Plan Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1999:93, paragraph 29.

422 See Chapter 2.

elements are agreed to be made for free, the total amount paid should, as a main rule, only be allocated to the elements that are agreed to be made for consideration. If one or more elements of a multiple-element supply have not been specifically agreed on as being made for consideration, the consideration for this composite supply cannot be allocated to those elements. This view is supported by (at least) two CJEU cases.

In the Fillibeck case,[423] the German tax authorities wished to impose VAT on the 'free' transport provided by Fillibeck to its employees.[424] Fillibeck tried to argue that transporting his employees to a work site was actually paid for by the employees, and therefore done 'for consideration', on the basis that the transportation was paid by 'a proportion of the work performed by the employees', which was, in Fillibeck's view, sufficiently well-defined and agreed. The CJEU did not agree with Fillibeck, explaining that "… since the work to be performed and the wages received are independent of the use or otherwise by employees of the transport provided to them by their employer, it is not possible to regard a proportion of the work performed as being consideration for the transport services. In those circumstances, there is no consideration which has a subjective value and a direct link with the service provided".[425] In other words, Fillibeck provided a service but not for consideration, because no specific payment[426] was agreed or paid for it.[427] Even though in this case, no actual 'multiple element supplies' were made, it is clear from the ruling that a consideration cannot be partially allocated to something (an act, an element) if that was not explicitly agreed.

In the Kuwait Petroleum case,[428] the UK tax authorities argued that the provision of gifts by a petrol company should be taxed as the (free) supply of gifts. The petrol company, Kuwait Petroleum, operated a scheme where people that purchased petrol could choose to collect a voucher per fixed amount of petrol purchased (e.g. with every 12 litres of fuel). The goods were provided to these clients in exchange for the vouchers with no additional payment. Kuwait Petroleum, using similar arguments as the German tax authorities in the Fillibeck case, argued that a proportion of the payment for the petrol should be considered to be made for these 'gifts', which would mean that the taxable amount for the totality of the supplies would only be the consideration received for the petrol and that there was no additional supply 'free of

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423 CJEU Case C-258/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491.

424 Taxation would be based on (the current) Article 26 of the EU VAT Directive and on the premise that commuting is 'private' or 'personal' and not a 'business' transaction.

425 CJEU Case C-258/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraphs 16-17.

426 The 'payment' would have been in kind, being part of the work performed by the employees.

427 However, the CJEU decided that it was for the national court to decide whether the German Tax Authorities should get to tax these free services, because even though they were covered by the relevant provisions in the EU VAT Directive (paragraph 26 of the ruling), in this specific case the personal benefit derived by the employees from such transport appeared to be of only secondary importance compared to the needs of the business (paragraph 30 of the ruling).

428 CJEU Case C-48/97, Kuwait Petroleum (GB) and Commissioners of Customs & Excise, ECLI:EU:C:1999:203.

charge' which should be taxed separately (in addition to the supply of the petrol that was supplied for consideration).

Even though the CJEU stated that it is for the national court to inquire whether, at the time of purchasing the fuel, the customers and Kuwait Petroleum had agreed that part of the price paid for the fuel, whether identifiable or not, would constitute the value given in return for the vouchers or the redemption goods, in its view nothing suggested that there was such reciprocal performance by the parties involved. The CJEU substantiates this view by stating that, first, under the promotion scheme the redemption goods were described as gifts and second, that the retail price of the fuel sold, whether or not the purchaser accepted the vouchers, was the same and this was the only price referred to on the invoices issued in relation to the fuel purchase. Therefore, according to the CJEU, Kuwait Petroleum could not reasonably maintain that the price paid by the customers of fuel in fact contained a component representing payment for the value of the vouchers or the redemption goods.[429] The CJEU upheld this decision in later rulings.[430]

The key point made in this case is that in the 'main' agreement (regarding the supply of fuel for consideration) between parties nothing was mentioned or agreed about a payment for the supply of the vouchers or redemption goods. More than that, the redemption goods were actually advertised as free.

In my view, the outcome of this case correctly reflects the 'economic and commercial reality' of these transactions. From an economic perspective, it can be argued that businesses never give away anything for free and that the price of 'gifts' will normally be included in the price of the products sold for consideration. However, this is 'economic reality' in the sense of 'economically' or 'from a financial point of view' rather than the concept of 'commercial reality' or 'the way a business is normally run', which in my view should be applied to this case.

From a commercial perspective, businesses prefer advertising or offering promotional products for free rather than for consideration, since 'free' items appeal more to customers. This means that the 'commercial reality' of the transaction implies that the promotional products are indeed offered free of charge. In my view, the supply of the promotional products is not absorbed by (or amalgamated with) the supply of the petrol – they are separate supplies from a VAT perspective, as I explained Section 4.2. Even though customers of Kuwait Petroleum have a right to the vouchers, the vouchers are not part of the supply of the petrol. The supply of the vouchers or, indirectly, the promotional products, are free supplies made conditional to the supply of a certain amount of petrol. The fact that the customers could decide not to take the

429 CJEU Case C-48/97, Kuwait Petroleum (GB) and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraphs 30 and 31.

430 See CJEU joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590, paragraphs 53-55.

vouchers, in my view, does not change that. In economic, or commercial, reality the goods are supplied free of charge.

Also, based on the EU VAT rules that are relevant for deciding whether a supply is made for consideration, the required 'direct link' between the payment (for the petrol) and the supply of the promotional products is absent. Besides the fact that the legal agreement stipulates that the goods are supplied for free, all customers that purchase petrol pay exactly the same amount per unit of petrol, regardless of whether they accept free vouchers with that supply. There is no agreed 'quid pro quo' as regards the payment and the supply of the vouchers or the 'underlying products'. The only 'quid pro quo' is the consideration paid by the customers for the supply of the fuel, which is offered at a specific price per unit. The fact that Kuwait Petroleum used part of the turnover generated by the sale of petrol to fund the supply of the promotional products is an internal accounting matter rather than a basis for establishing a direct link between the payment for petrol (as based on an explicit legal agreement stipulating price per unit) and the supply of the promotional gifts.

Based on the above, it can be argued that the legal relationship or the agreement dictates whether the consideration agreed and paid/received for a multiple-element supply should also be allocated to specific elements thereof. In my view, in both CJEU cases described above, the legal agreements between the parties could be used as a basis for the VAT consequences of the transactions, as they correctly reflected the 'economic and commercial reality' of these transactions.

As I mentioned in Section 2.5, 'economic and commercial reality' is, in my view, based on the purport or aim of the agreement between the parties, separate from the way in which that agreement is put into wording/writing.[431] Only where the 'economic and commercial' reality deviates from legal reality, the VAT treatment of a transaction should not be based on the legal reality but the economic and commercial reality.[432]

The accountancy approach to transactions can also be seen as the application of a specific form of 'commercial and economic reality' (see Section 4.5.2.2). For multiple-element transactions where one (or more) of the elements is advertised as (and agreed to be) free, in my view this 'reality' can be also be applied, as I will describe in Section 4.5.2.6.

The above implies that business making composite supplies are very much in control of the VAT treatment of their composite supplies, as they decide how to advertise the specific separate elements of a composite supply and how they price these elements, as well as how the transactions are legally agreed. Customers, especially end consumers, normally are not actively involved in negotiating the terms to an

[431] In the same sense, see CJEU case C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409.

[432] Unless the transaction constitutes abuse of law.

agreement for the supply of goods or services to them. This does not mean that these businesses have unlimited powers in this respect: they are also bound by 'economic and commercial reality'. For example, advertising the supply of a car (subject to the standard VAT rate) where the purchaser also gets a bunch of flowers (subject to the lower VAT rate) as the purchase of (a very expensive) "bunch of flowers and a free car!" should not result in applying the lower VAT rate to the entire consideration for this composite supply. I will elaborate on the mitigating effect of the application of 'economic and commercial reality' to the 'unlimited power' of businesses deciding the VAT treatment of composite supplies in Section 4.5.2.6.

4.5.2.2 Accounting rules as a reflection of 'commercial and economic reality'

Having compared the accounting rules for determining whether a supply is made for consideration as described in Section 4.1.2.3 with the EU VAT rules that should be applied for that purpose (as described in Section 4.2), I will now compare the EU VAT rules relevant for deciding whether all element of a composite supply are supplied for consideration (as described in Section 4.5.2.1) with the accounting rules that are relevant for this purpose.

Above, in Section 4.1.2, I explained why the accounting rules, and more specifically the rules regarding 'revenue recognition', can be useful for interpreting EU VAT rules regarding the VAT treatment of composite supplies. However, the proposed accounting rules regarding revenue recognition seem to steer away from the way multiple-element transactions are looked at from an EU VAT perspective. Under the proposed rules for revenue recognition, revenue should be allocated to each separate performance obligation. This implies that this should also be the case for 'performance obligations' that are advertised as 'free elements' to a multiple-element supply, which is different from the 'main' VAT rule described above.

Upon closer inspection, however, the fact that, under the proposed rules, revenue is allocated to all agreed performance obligations is based on practical grounds rather than rule based (avoiding discussions about how to identify the 'main' goods or services for which the customer has contracted or whether an element qualifies as a 'performance obligation' or rather as a 'marketing incentives', also keeping in mind that the outcome of that assessment could vary significantly depending on whether it is made from the perspective of the business model of the performing entity or from the perspective of the customer).[433] To me, this means that existing accounting rules that are actually 'rule based' may still provide relevant guidance, since they, rather than being broadly applicable and practicable, more accurately reflect commercial and

[433] FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 107, paragraphs BC64-BC65 (Marketing incentives, incidental obligations, and perfunctory obligations).

economic reality. I will first briefly describe the proposed rules, and then describe the current rules, similar to how I did this in Sections 4.1.2.4 above.

4.5.2.3 Proposed accounting rules

In the process used for recognising revenue, a number of steps are prescribed under the proposed rules. I described the first two steps, 'identifying the contract with a customer' and 'identifying the separate performance obligations in the contract', in Section 4.1.2.4. These steps were applied to determine which elements should be included in a multiple-element transaction.

I will now describe the next (proposed) steps used for revenue recognition, demonstrating that these can be used for determining whether specific elements of a multiple-element transaction are performed for consideration, even if they are advertised as 'free'. As mentioned above, I will also show that the result of applying these (proposed) rules is not the same as the result of applying the relevant EU VAT rules.

I will first briefly list the steps, and then elaborate on Step 4, which is – in my view – the most relevant step for the purpose stated above. The steps are:

Step 3: Determine the transaction price
The transaction price is the amount of consideration to which an entity expects to be entitled in exchange for transferring promised goods or services to a customer, excluding amounts collected on behalf of third parties (for example, sales taxes).[434]

Step 4: Allocate the transaction price to the separate performance obligations in the contract
For a contract that has more than one separate performance obligation, an entity would allocate the transaction price to each separate performance obligation in an amount that depicts the amount of consideration to which the entity expects to be entitled in exchange for satisfying each separate performance obligation.

To allocate an appropriate amount of consideration to each separate performance obligation, an entity would determine the stand-alone selling price at contract inception of the good or service underlying each separate performance obligation and allocate the transaction price on a relative stand-alone selling price basis. If a stand-alone selling price is not observable, an entity would estimate it.[435]

Step 5: Recognise revenue when (or as) the entity satisfies a performance obligation
This step is outside the scope of this research.

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[434] IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 8 (IN 16).

[435] IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 10 (IN 18-IN 19).

4.5.2.4 Allocating consideration to separate performance obligation (Step 4)[436]

Under the proposed rules, under Step 4 an entity shall allocate a discount entirely to one (or some) separate performance obligation(s) in the contract if both of the following criteria are met:
(a) the entity regularly sells each good or service (or each bundle of goods or services) in the contract on a stand-alone basis; and
(b) the observable selling prices from those stand-alone sales provide evidence of the performance obligation(s) to which the entire discount in the contract belongs.

The above seems to imply that if, for example, a supermarket would offer a crate of beer that includes a 'free beer glass', and where that supermarket would not sell that beer glass on a stand-alone basis, the 'discount' cannot be allocated to the beer glass. However, if the beer glass is not considered a 'performance obligation' but rather a 'marketing incentive', this is different, because in that case the accountancy rules hold that the free supplies are treated as marketing costs, which implies that no revenue should be allocated to these transactions or elements, making them separate supplies that are made free of charge (I will elaborate on this later in this Section). It is not always clear how to determine whether a supply should be considered a 'performance obligation' or a 'marketing incentive'.

In an appendix containing application guidance to the proposed rules, the Section 'Customer options for additional goods or services' includes guidance on the acquisition of additional goods or services for free.[437] The fact that in this section, specific reference is made to the paragraphs in the proposed rules that regard the allocation of the transaction price to separate performance obligations[438] means that the supply of these free goods can be considered separate performance obligations, if the supply meets the relevant requirements (see above).

The fact that the supply of free goods and services can indeed qualify as separate performance obligations is also supported by the considerations of the Boards of IASB

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436 IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 36-38 (paragraphs 70-76) and/or FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 27-29 (paragraphs 70-76).

437 Appendix B (Application guidance) to IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 56-57 (paragraphs B20-B24) and/or Proposed Implementation Guidance and Illustrations to FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 47-48 (paragraphs IG20-IG24).

438 Paragraphs 70-76 of both IFRS, Revenue from Contracts with Customers, Exposure Draft ED/2011/6, 2011, p. 36-38 and FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 27-29 (Allocating the transaction price to separate performance obligations).

(and FASB) in developing the proposed rules.[439] In the section about marketing incentives, incidental obligations, and perfunctory obligations, the Boards included the following (deletions and underlining by me, JB):[440]

"Some respondents to the (…) proposed Update suggested that an entity should account for some promised goods or services as marketing expenses or as incidental obligations even though those promises meet the definition of a performance obligation. Examples of such promised goods or services include "free" handsets provided by telecommunication entities (…). Those respondents thought that revenue should be recognized only for the main goods or services for which the customer has contracted and not for the marketing incentives and other incidental obligations.

When a customer contracts with an entity for a bundle of goods or services, it can be difficult and subjective for the entity to identify the 'main' goods or services for which the customer has contracted. In addition, the outcome of that assessment could vary significantly depending on whether an entity performs the assessment from the perspective of its business model or from the perspective of the customer. Consequently, the Boards decided that all goods or services promised to a customer as a result of a contract are performance obligations because they are part of the negotiated exchange between the entity and its customer. Although the entity might consider those goods or services to be marketing incentives or incidental goods or services, they are goods or services for which the customer pays and to which the entity should allocate consideration for purposes of revenue recognition. In contrast to performance obligations in a contract, marketing incentives are provided independently of the contract that the incentives are designed to secure. (…)"[441]

It is clear from the above that for accounting purposes, a difference exists in the (proposed) rules regarding the supply of free goods and services as part of an 'overall' agreement, in which case these free supplies should be considered separate performance obligations and part of the consideration should be allocated to these free elements, and the free goods and services that are supplied independently of the contract that these incentives are designed to secure. In the latter case, the free supplies are qualified as 'marketing incentives' that are treated as marketing costs, which implies that no revenue should be allocated to these transactions or elements.

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439 FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 86-209 (Background Information, Basis for Conclusions, and Alternative Views).

440 The views of the IASB Board can be found in a FASB document: FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 107, paragraphs BC64-BC65 (Marketing incentives, incidental obligations, and perfunctory obligations).

441 For similar reasons, the Boards decided not to carry forward the contingent revenue allocation guidance (often described as the contingent revenue cap) as described in the first telecoms example above (FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 147-149, paragraphs BC193-BC197 (Contingent revenue cap).

The relevant section in the Background Information to the proposed rules confirms that the decisive factor for determining whether a free supply qualifies as a performance obligation or a marketing or promotional offer is whether that supply is based on a contractual promise to transfer a good or service to the customer.[442]

It seems that under the above accounting rules, part of the consideration for a multiple-element transaction is always allocated to elements that are advertised as 'free supplies' in a multiple-element transaction as long as these elements are explicitly included in the agreement governing the multiple-element transaction and as long as the supplies do not qualify as marketing incentives as defined in the relevant (proposed) rules, i.e. never part of the contract but supplied to secure a(nother) contract.

These rules seem very similar to the EU VAT rules on this subject. Looking at the CJEU Kuwait Petroleum case,[443] the vouchers (and redemption goods) given away by the fuel company seem to qualify as 'marketing incentives' because, in my view as confirmed by the CJEU, the supply of the vouchers is not 'paid for as part of the (existing) contract regarding the supply of fuel' and therefore the revenue for the sale of the fuel should not be allocated to these goods.

As another example, the supply of a 'free' telephone with a telephone subscription does, in my view, not qualify as a 'marketing incentive'. The supply is part of the existing contract/part of the agreement and therefore, part of the consideration paid/received for this multiple-element transaction should be allocated to the supply of that telephone. However, in my view, free supplies can also be qualified as 'marketing incentives' if they are part of the same supply that is contractually agreed as the 'main supply'. This is currently reflected in the FASB accounting rules that I will describe in Section 4.5.2.5.

Because the proposed rules are not completely clear about the difference between 'performance obligations' and 'marketing incentives' and because part of the consideration paid for a multiple-element supply consisting of multiple performance obligations should be allocated to all performance obligations, even if advertised as 'free', in my view, these proposed rules are not suited for determining the VAT treatment of multiple-element supplies since they do not properly reflect 'economic and commercial reality' as an EU VAT concept.

4.5.2.5 Accounting for free products under current FASB rules

In this section I will not focus on the current IFRS rules for accounting for free products, because they provide very limited guidance on this issue, as I mentioned in

442 FASB Exposure Draft, Proposed Accounting Standards Update (Revised), Revenue recognition, Revenue from Contracts with Customers, 2012, p. 181-182, paragraphs BC296-BC297 (Customer options for additional goods or services)

443 C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203.

Section 4.1.2.3. In contrast, the current[444] FASB or US GAAP rules on revenue recognition are detailed and elaborate. There are specific rules for determining how to deal with 'multiple-deliverable arrangements' and for separating consideration in those arrangements.[445] There are also specific rules for customer payments and incentives.[446] Under these rules, a delivered item or delivered items in an arrangement with multiple deliverables shall be considered a separate unit of accounting if both of the following criteria are met:

1. the delivered item or items have value to the customer on a standalone basis, which is the case if they are sold separately by any vendor or the customer can resell the delivered item(s) on a standalone basis, and
2. if the arrangement includes a general right of return relative to the delivered item, delivery or performance of the undelivered item or items is considered probable and substantially in control of the vendor.[447]

The amount allocable to the delivered unit or units of accounting is limited to the amount that is not contingent upon the delivery of additional items or meeting other specified performance conditions.[448]

In an example, taken from the FASB's 'Multiple Deliverable Revenue Arrangements' Section, the application of these rules can be shown as follows:

CellularCo runs a promotion in which new customers who sign a two-year contract receive a free phone. There is a one-time activation fee of $50 and a monthly fee of $40 for the ongoing service. The same monthly fee is charged by CellularCo regardless of whether a free phone is provided. The phone costs CellularCo $100. Further, assume that CellularCo frequently sells the phone separately, for $120. CellularCo is not required to refund any portion of the fees paid for any reason.

Based on the above information, the phone and the service should be accounted for as separate units of accounting, because a) the phone has value on a standalone basis and b) there are no general rights of return in this arrangement.

Without considering whether any portion of the amount allocable to the phone is contingent upon CellularCo's providing the phone service, CellularCo should allocate the arrangement consideration on a relative selling price basis as follows: $112.22 ($1,010 x ($120 / ($120 + $960))) to the phone and $ 897.78 ($1,010 x ($960 / ($120 + $960))) to the phone service. However, because a free phone is provided in the arrangement and the customer has no obligation to CellularCo if the phone service

444 Current at the time of conception of this chapter, i.e. February 2019.

445 FASB, Revenue Recognition, Topic 605-25: Multiple-Deliverable Revenue Arrangements, No. 2009-13, 2009.

446 FASB, Revenue Recognition, Topic 605-50: Customer Payments and Incentives.

447 FASB, Revenue Recognition, Topic 605-25: Multiple-Deliverable Revenue Arrangements, No. 2009-13, 2009, par. 605-25-25-5.

448 FASB, Revenue Recognition, Topic 605-25: Multiple-Deliverable Revenue Arrangements, No. 2009-13, 2009, par. 605-25-30-5.

is not provided, $62.22 (assuming the customer has paid the non-refundable activation fee) is contingent upon CellularCo's providing the phone service. Therefore, the amount allocable to the phone is limited to $50 ($112.22 - $62.22) and the amount allocable to the phone service is increased to $960.[449]

It is clear from the above that even though the phone is advertised as 'free', from an accounting perspective (under the current rules), part of the consideration paid for the transaction as a whole should be allocated to the phone. However, it seems that if in the above example no activation fee would have been charged, none of the consideration would have been allocated to the phone and then it would have actually been supplied for no consideration. I've included another example, from the 'Customer Payments and Incentives' Section,[450] to illustrate the rules regarding 'free goods':

This example is based on the sale of Model R personal computers by Personal Computer Retailer A (Retailer A). The list price of Model R is $2,000 and the cost to Retailer A is $1,400. Retailer A advertises that for each Model R computer purchased, customers will receive at the time of purchase a 27-inch television. The cost of the television to Retailer A is $300.
The marketing incentive would be characterised in the income statement as follows:

Retailer A			
Cash or Accounts Receivable	$2,000		
Costs of goods sold*		$1,700	
Sales			$2,000
Inventory			$1,700

* The expense associated with the free product ($300) has been classified as cost of goods sold.
The cost of the marketing incentive should be recognised at the time of sale of Model R computers to customers.[451]

In this second example, the total consideration is not divided between the two supplies but the supply of the 'free product' is treated as a 'discount in kind',[452] which is made clear by the last remark in the example: the cost of the marketing incentive should be recognised at the time of the sale of the main supply. This means that, even though at the time of the sale, the value of the supplied free product decreases the value of the inventory, this is considered a cost. Otherwise the cost of the marketing incentive would have been recognised at the same time as the cost of the main goods that are to be supplied (the inventory).

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449 This example, in a slightly adjusted form, was taken from the FASB's Overview and Background Section to Topic 605-25, 23 2012, Example 1 (par. 605-25-55-8 – 605-25-55-12).

450 FASB, Revenue Recognition, Topic 605-50: Customer Payments and Incentives.

451 This example, in a slightly adjusted form, was taken from the FASB's Overview and Background Section to Topic 605-50, 4 2012, Example 19, Case D (par. 605-50-55-79 and 605-50-55-92/60-50-55-94).

452 For accounting purposes this is referred to as 'consideration given by a vendor to a customer' – see FASB's Overview and Background Section to Topic 605-50, 4 2012, par. 605-50-05-1.

The question then is: what makes the supply of a free phone with a subscription different from the supply of a free television with a personal computer? Based on the different Sections in the relevant FASB documents in which the examples appear, the FASB seems to not consider the supply of the phone a marketing incentive but rather a deliverable in a multiple-deliverable arrangement, whereas the supply of the free television is considered a marketing incentive rather than a deliverable in its own right. This appears to be a result of the fact that a personal computer retailer normally does not sell televisions. I have not examined this further, because it is not sufficiently relevant for this research.

The above in my view demonstrates that the current FASB accounting rules regarding multiple-element transactions differ from the EU VAT rules on this subject, in a similar way to the proposed rules. This means that even though accounting rules are a reflection of 'economic reality', both the current as well as the proposed accounting rules do not correspond with the EU VAT concept of 'economic and commercial reality' and therefore they should not be used for determining the VAT treatment of multiple element transactions. This can also be explained from the fact that the different sets of rules (the EU VAT rules and the accounting rules) were designed for different purposes, even though the outcome of the application of all rules should of course reflect the economic and commercial reality of the transactions they are applied to. In the dictionary, accounting is defined as the system of recording and summarizing business and financial transactions and analysing, verifying, and reporting the results.[453] The purpose of IFRS accounting standards is to provide a high quality, internationally recognised set of accounting standards that bring transparency, accountability and efficiency to financial markets around the world.[454] The purpose of the EU VAT rules is to ensure the taxation of expenditure on local private consumption, as I explained in Section 2.4.4. These different purposes explain the different perspectives from which both sets of rules relate to transactions and the valuation of transactions.

The above means that the rules for determining whether 'free elements' of a multiple-element transaction are actually supplied free of charge should be based on the existing VAT rules and CJEU case law, including 'economic and commercial reality'. Where an element to a multiple-element supply is advertised as 'free', that element should be considered to be supplied for free, unless in economic and commercial reality that element is not supplied for free. I will now elaborate on this.

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453 Merriam-Webster online dictionary, visited on 21 February 2019, at the following site: https://www.merriam-webster.com/dictionary/accounting

454 IFRS webside, visited on 21 February 2019, on: https://www.ifrs.org/use-around-the-world/why-global-accounting-standards/

4.5.2.6 Economic and commercial reality: possible exceptions to the main rule that 'free elements' are actually free

The concept of 'commercial and economic reality' is implicitly used by the CJEU in the Serebryannay vek-case,[455] where parties had agreed that a supply would be made 'for free' but where, effectively, this transpired not to be the case. There was a legal relationship between the provider of the services and the recipient pursuant to which there was reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. In the circumstances of that case, a contract was concluded whereby the lessee of apartments did not have to pay rent to the lessor (the owners) during the term of the contracts. By contrast, the lessee undertook to carry out in its own name, at its expense and according to its own assessment, fitting-out and assembly work in order to complete the apartments and put them into service for the purposes of use, inter alia the purchase and provision of floors, furniture, decoration and bathroom installations. It was envisaged that, at the end of those contracts, the lessor (the owners) would recover the apartments concerned with the fixtures to be found there. The CJEU decided that this arrangement fell within the category of a supply of services for consideration.[456]

The above ruling makes clear that 'commercial and economic reality' should be used for determining the VAT treatment of transactions, even in situations where the (underlying) contractual agreements suggest a different outcome, where the 'legally agreed reality' (i.e. 'not having to pay rent') differs from the economic and commercial reality of a transaction (i.e. 'paying rent in kind').

Something similar happened in the Volkswagen case.[457] In this case, Volkswagen made two separate supplies of services (lease of a vehicle and financing that vehicle). It had incurred costs that it had used for performing both services, but under UK legislation, it was only allowed to include those costs in one of the services (the financing services). The UK Tax Authorities therefore argued that these costs should only be (directly and fully) allocated to those transactions (which were VAT exempt, disallowing deduction of VAT on those costs). Even though the fact pattern is very different, the reasoning used by the CJEU to come to the decision that the costs should be allocated to both services because the costs were "in fact incurred, at least to a certain extent, for the purpose of" performing the non-exempt transactions. 'In fact' means 'based on the relevant, objective facts', which is equivalent to the concept of 'economic and commercial reality' as applied in this research. This means that

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455 CJEU case C-283/12, Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite, ECLI:EU:C:2013:599.

456 CJEU case C-283/12, Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite, ECLI:EU:C:2013:599, paragraphs 37-40.

457 CJEU case C-153/17, Commissioners for Her Majesty's Revenue and Customs v Volkswagen Financial Services (UK) Ltd, ECLI:EU:C:2018:845.

actual factual reality trumps legal, deemed, realities or legally agreed realities where these deviate from factual reality (unless the legal, deemed reality is based on EU VAT rules). I have not been able to find CJEU case law where the court explicitly applied 'economic and commercial reality' to decide that an element to a composite supply that was advertised as free, was actually supplied for consideration. I have discussed the Marks & Spencer case, where a UK court decided that an element to a composite supply that was advertised as 'free' was considered to be supplied for consideration, and explicitly based its decision on economic and commercial reality, in Section 2.6.4.2. I have not come across any literature on this specific issue.

I will now examine a number of situations involving multiple-element-transactions where one of the elements is advertised as 'free', to determine whether 'commercial and economic reality' dictates that (part of the consideration) is actually also paid for this 'free' element. For this purpose, it should be kept in mind that the 'main' EU VAT rule is that each supply or element to a composite supply should be regarded individually, and that it should be established whether one or more of the elements to a composite supply is/are made free of charge. After these steps, the consideration paid for the composite supply should be allocated to and divided between the elements that are made for consideration.

4.5.2.7 The VAT treatment composite supplies where the 'free' element has an absolute and relatively high value

Situations exist where the 'free' element included in a multiple-element supply represents a considerable value, both in absolute terms as well as in comparison to the other element(s) of the transaction. This could imply that the customer will base his decision to make the purchase (or: engage in that transaction) also, or even mainly, with the aim of obtaining that free element. In other words, the free element is 'an aim in itself' for the customer. This means that there is no 'absorption' or 'amalgamation' and that, as a basic rule, each element should have its own VAT consequences, based on – as a main rule – the legal agreement regarding the supply of that element.

Where the 'free' element has an absolute and relative high value, the (typical) customer should not seriously expect that, given the value of the free element, this element is actually supplied to him for free in these cases. The typical customer should consider that the amount of the agreed consideration is also based on the fact that part of it is used for payment of the 'free' element. In these cases, the typical customer would be less inclined to pay the same price for the transaction if the 'free' element was not included. It could even be clear that most customers would not do that. A (now historic)[458] example of such transactions in the Netherlands were telecoms services providers that offered 'free' handsets with certain monthly plans/subscription forms. In a Civil Law case, it was decided by the Dutch Supreme

[458] Based on Dutch consumper protection rules, these deals are no loner allowed.

Court that for the clients, the new handset generally represented, both in absolute terms as well as in comparison to the amount payable for monthly use of the telecoms services, a significant value.[459] As a result, the Dutch Supreme Court stated that it should be assumed that a customer will normally decide to enter into that specific agreement also with a view on obtaining ownership of a new handset. In general, given the value of the handset, the customer will (or should) not expect to actually receive the handset for free. He will have to take into consideration that the agreed monthly instalments also include consideration for the supply of the handset.

In the case of the above example, the price of the composite supply was clearly determined by both elements of the transaction (the telecommunications service as well as the supply of the handset). The price of the service by itself, without the handset, would be significantly lower.[460] Under these circumstances (the value of the 'free' element, the fact that it is an aim in itself for the customer and the fact that its value significantly affects the agreed consideration for the composite supply), in my view, commercial and economic reality dictates that the element advertised as 'free' is actually made for consideration.

Even though the accounting rules proved not to be fully suitable for determining the VAT treatment of multiple-element transactions, applying the perspective of 'commercial and economic reality', in the sense of the current FASB rules, it could also be used to argued that the free handset is an 'agreed deliverable' rather than a 'marketing incentive'. This would also suggest that part of the consideration paid for the composite supply should be allocated to this 'free' element.

In the earlier example of the vouchers issued by the fuel company, in my view, motorists would not be less inclined to purchase the specific brand of petrol for the advertised price if they would not receive the (vouchers for the) free goods. These free goods might persuade the customer to be loyal to the brand of petrol that provides the vouchers, but they are in my view not an aim in itself for the customers when they make their fuel purchase. Also, even though "there is no such thing as a free lunch", and the purchasers of the fuel probably understood that part of their payments covered the supply of the 'free gifts', no direct link exists between the payments and the supply of the vouchers or the redemption goods. The customers that chose not to accept the vouchers paid the same price for the fuel, which means that they also funded these gifts. Also taking into account the 'commercial and economic reality' in the accounting sense, the free redemption goods should be

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459 Hoge Raad (Dutch Supreme Court), 13 June 2014, No. 13/04341, ECLI:NL:HR:2014:1385.

460 As a result of the Civil law case cited, this practice no longer exists in the Netherlands. I have, however, compared prices as quoted by a telecoms provider of its services based on a plan that includes monthly payments for telecoms services as well as a handset to the price of the same services without the handset. The average price difference, representing the value of the handset, was GBP 775. I used the following websites on 24 October 2017: http://shop.vodafone.co.uk/shop/pricePlans/plansHome.jsp?dlAction=addDevice&planType=onAccount&bundleSkuItemId=sku49218084&hardwareSkuId=sku90311 and https://www.vodafone.co.uk/shop/bundles-and-sims/sim-only-deals/ .

qualified as 'marketing incentives' rather than 'agreed deliverables', implying that no part of the agreed consideration should be allocated to the supply of the redemption goods.

Accepting a certain price for a supply, whilst understanding that part of the receipts for those supplies will be used for funding free gifts does not constitute a payment for the supply of those gifts. If that were the case, then one could also argue that free lunches served at the headquarters of the petrol company and the yearly Christmas party are also paid for by allocating part of the revenue generated by all petrol sales to these supplies as 'third party payments'. This is clearly not the case (from an EU VAT perspective).

Taxpayers should be very aware of the VAT consequences that the above can have. The fact that, in the above example, the payment made for the telecoms subscription should be partly allocated to the supply of the telephone means that the VAT on that part of the consideration that is received or still has to be received will become payable when the right to dispose of the telephone as owner is transferred to the customer.[461] A UK court also considered the absolute and relative value of a 'free' element of a composite supply relevant in its decision that this element was actually supplied for consideration. This case is described in Section 4.5.2.8.

4.5.2.8 The VAT treatment of 'combination deals'

Other species of 'free elements' to a multiple-element transaction are the transactions where a customer can obtain one or more items, often of the same type and/or brand, for free with the purchase of a minimum number or value of other purchases. Examples are 'buy two, get one free' and 'the cheapest item out of five for free'. Another way of presenting these proposed transactions would be 'buy three for the price of two' and 'buy five for the price of four'.

In these schemes, the free element is an aim in itself for the customer (contrary to, for example, the free goods supplied with the purchase of petrol) and it cannot be obtained for free unless other purchases of items of the same type and/or brand are made as well.

Similar to the items described in the previous section (4.5.2.7), the absolute and relative value of the free items would be an indication of the fact that economic and commercial reality require the consideration paid to be partly allocated to the free elements. However, the difference with the transactions described in the previous section is that, for example, the price for the two items purchased without the 'free' third item, and the price of four items without purchasing a fifth, is the same as when

461 Articles 2(1)(a), 14(2)(b), 62 and 63 of the EU VAT Directive.

the 'free' element would be included in the transaction. This could be considered an indication that these elements are actually supplied for no consideration.[462]

In these latter cases, the 'economic and commercial reality' is that in fact, a discount is offered for a multiple-element purchase. This is, in my view, not a 'discount in kind', as has been defended,[463] but an actual discount on the purchase of all (agreed) elements of the transaction. The economic and commercial reality is, in my view, that the customer can choose three items and pay for those three items the price that she would have normally had to pay for two items. The payment, however, is clearly meant to be made for the entire transaction. The same applies to the other example ('buy five for the price of four'). Economically and commercially, a discount is granted on five (usually similar) items to boost turnover. This was confirmed by a UK court that decided that, based on economic and commercial reality, a scheme where a supermarket offered 'three food items for consideration' to 'get a bottle of wine for free' was to be treated for VAT purposes as if all elements were supplied for consideration, even the element that was advertised as 'free'.[464]

This is not the same as rewarding loyal customers by giving them free goods, as was the case for Kuwait Petroleum. In the first situation, customers choose to purchase three items and pay a smaller amount (i.e. the price of two items) than the total selling price of the individual elements, and the customer decides which items he chooses to purchase at the time of the transaction. Usually, these schemes dictate that the cheapest of the three items will be supplied at no extra cost ('for free') but the customer first gets to decide which items he wants to purchase (and, ultimately, for what price). In the 'petrol and free goods'-example, the customer cannot choose to buy as many 'redemption goods' as possible to get a few litres of free petrol. The first scheme is a discount scheme, the second a loyalty scheme that rewards multiple purchases with free goods. In accounting terms, all items in the first scheme are 'deliverables in a multi-deliverable agreement' whereas the 'redemption goods' are considered 'marketing incentives'.

From the viewpoint of 'commercial and economic reality', these schemes are different and therefore they should be treated differently from a VAT perspective. This means that in my view, based on the economic and commercial reality of these types of 'combination deals', they should be treated as discounted deals where the total payment is made for all elements of the multiple-element transaction.

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462 CJEU case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 31.

463 S.T.M. Beelen, Aftrek van btw als (belaste) omzet ontbreekt, Kluwer (Netherlands) 2010, p. 349, in an example based on the Dutch VAT rules regarding vouchers (the so-called 'zegeltjesregeling').

464 Marks And Spencer Plc v Revenue and Customs (VAT : promotional offer) [2018] UKFTT 238 (TC) (10 April 2018), to be found online at http://www.bailii.org/uk/cases/UKFTT/TC/2018/TC06471.html

4.5.2.9 The VAT treatment of transactions where the customer has to accept the 'free' element

In some cases, the element advertised as 'free' is included in (the packaging of) the composite supply, making it impossible for the customer not to accept it. Examples are a third bottle of shampoo shrink-wrapped with two other bottles, where the offer is "get the third one for free" or a six-pack of bottles of beer where a beer glass is included in the packaging and advertised as "beer plus a free glass".

On the one hand, it can be argued that since the products on offer are all well-defined and the products can only be supplied together for a fixed price, the 'free element' is, effectively, not 'free of charge'. On the other hand, it can also be argued that if the supplier of these multiple-element offerings also sells the separate elements as included in the multiple-element offering, offering one of the elements for free should indeed be treated as such, especially in situations where the 'free element' is not an aim in itself for the (potential) customers.

In my view, there is no 'one solution fits all' for this type of multiple-element transaction. With regard to the above examples, it could be argued that the additional bottle of shampoo is an actual aim in itself for the average customer, making the transaction a 'discounted' sale of three bottles of shampoo. It could also be argued that the free beer glass is not an aim in itself, making it, in accounting terms, a 'marketing incentive' rather than an 'agreed deliverable'. This could, of course, be different if the glass was a valuable collectors' item.

What this means is that, in my view, the fact that a customer does not have a choice to accept an element that is advertised as 'free' cannot be considered a decisive element to use as the basis for deciding whether that element is, effectively, supplied free of charge. The concept of economic and commercial reality, as described and used above, should be applied to these types of offers on a case-by-case basis. Economic and commercial reality should, therefore, still dictate the VAT treatment of these types of multiple-element transactions in cases where this reality means that the 'free element' is actually not supplied for free.

4.5.2.10 The VAT treatment of a supply where the free element is an explicit part of the negotiated deal.

Similar to the rules as described above in section 4.5.2.8, commercial and economic reality imply that if a 'free element' is part of a negotiated (and therefore legally agreed) deal, the price paid for the multiple-element transaction should also be allocated to the 'free' element (unless the negotiated extra element can be qualified as a 'marketing incentive').[465] Therefore, part of the price agreed and paid/received for

[465] In my view, 'free elements' that are included in a negotiated deal through negotiation cannot qualify as 'marketing incentives' because the customer and the supplier apparently agree that the added element is of significant value in relation to the total deal and explicitely included as such, unlike a marketing incentive that is normally included in the initial offering made to multiple potential purchasers at the initiative of the supplier.

this multiple element transaction should be allocated to the 'free' negotiated element. This is (implicitly) confirmed in another EU Directive that I will describe in the next section.

4.5.3 More EU rules on multiple-element transactions

As demonstrated above, when determining whether (all elements of) a (multiple-element) transaction is (are) made for consideration, the agreement or contractual structure is leading unless the contract is not in line with economic or commercial reality.[466]

This view is supported by the interpretation of an EU Directive on certain aspects of the sale of consumer goods and associated guarantees.[467] Because the matter is not explicitly regulated by this directive, I asked the official EU information service for clarification of a specific point in the Directive (see below).[468] I accept that this is not a proper scientific method of research, but since the result of this section is only intended to demonstrate that my views are supported by other sources, I decided to include it. I asked the EU information service the following question:

"I found information about the customers' rights in case of purchase of faulty products. It says everywhere that the item must be 'purchased'. What if the product was free, as part of a larger deal - e.g. a free foot stool that came with an expensive sofa and the footstool breaks down after a couple of weeks as a result of a manufacturing error. Do I still have the same rights (i.e. right to a guarantee), even though I did not agree to pay for that specific product. I understand that the price of the smaller product was included in the price of the main item, but under the agreement it did not cost anything. On the invoice, the sofa is mentioned for the full price and the footstool for the amount of Euro 0. Could you please inform me where I can find the relevant background information (legislation, regulations etc.) to answer this question?"

The EU information service answered me as follows (underlining by me, JB):

"This matter is not explicitly regulated by Directive 1999/44/EC* on the sale of consumer goods. Nevertheless, when the consumer negotiates with the trader, the

466 See, for examples of EU case law that support this view, CJEU Cases C-283/12, Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite, ECLI:EU:C:2013:599, C-653/11, Her Majesty's Commissioners of Revenue and Customs v Paul Newey, ECLI:EU:C:2013:409, and C-425/06, Ministero dell'Economia e delle Finanze v Part Service Srl, company in liquidation, formerly Italservice Srl, ECLI:EU:C:2008:108.

467 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12–16.

468 I asked the Europe Direct Contact Centre (EDCC) by e-mail. EDCC is part of Europe Direct, a free official EU information service open to everyone that has questions about any topic related to the EU and its workings. For more information, see http://europa.eu/europedirect/index_en.htm, last visited on 3 January 2014.

final price agreed between the parties would normally cover all products included in the contract of sale, including those that were added as a part of the bargain or negotiations. The fact that this additional element is presented by the trader as "free" is of no relevance for the application of the legal guarantee, as it is merely a marketing technique linking the sale of an expensive product with an additional benefit to persuade the consumer to decide. In fact, the total price covers both products and consequently the legal guarantee applies to these both products as well. A similar example of this situation are marketing techniques such as "buy 2 and receive the third for free".

The situation would be different, if the trader offers a real gift to the consumer which is not part of the bargain and therefore not part of the sales contract to which Directive 1999/44/EC applies. For example, when parties already agreed on the price and other conditions of sale, and only afterwards the trader voluntarily offers a gift to strengthen the brand loyalty of the consumer. In this case, the gift is not part of the contract of sale and is not subject to the legal guarantee under Directive 1999/44/EC."[469]

This demonstrates that under the rules of at least one other EU Directive, the 'sale'[470] of goods includes the supply of goods advertised as 'free' that are part of negotiated deal. I consider this relevant, because in interpreting concepts of Union Law, as included in the EU VAT Directive, the CJEU considers that the explanation of the same or similar Union concepts as included in other EU legislation can possibly be used as guidance[471], keeping in mind the possible similarities and differences in the aim, purpose and context of those provisions included in other EU legislation. Also, in at least one proposal for an amendment to the EU VAT Directive, a specific concept ('payment service') is defined by reference to its definition in another EU Directive.[472]

4.5.4 Summary: when is a 'free element' actually supplied for consideration

As a main rule, payments for a multiple-element transaction should not be partly allocated to elements of that transaction that are advertised as and agreed to be

469 This answer was sent to me on 5 November 2013 by the Europe Direct Contact Centre, with Case ID No. 0806153 / 5853365. This mail correspondence is not published, but I am happy to send a copy to interested parties, upon request.

470 As is clear from this section, 'sale' refers to a supply of one or more goods or services for consideration.

471 The CJEU made reference to concepts from other Union Legislation in CJEU cases C-8/01, Assurandør-Societetet, acting on behalf of Taksatorringen, and Skatteministeriet, ECLI:EU:C:2003:621, par. 45, C-169/04, Abbey National plc, Inscape Investment Fund v Commissioners of Customs & Excise, ECLI:EU:C:2006:289 and C-363/05, JP Morgan Fleming Claverhouse Investment Trust plc, The Association of Investment Trust Companies v The Commissioners of HM Revenue and Customs, ECLI:EU:C:2007:391.

472 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012) 206 final, 2012/0102 (CNS), proposed Article 30a(2), p. 19.

made for no consideration. However, this is different where commercial and economic reality require differently, as is the case in a number of situations.

If the 'free element' is absorbed or amalgamated into the main supply that is made for consideration, as a result of which it no longer exists from a VAT perspective, the consideration should also be considered to be paid for that 'free', absorbed or amalgamated, element. Absorption and amalgamation are reflections of economic reality, since they apply in cases where the elements constitute a single, indivisible economic supply, which it would be artificial to split.

Also, if the 'economic and commercial reality' of a multiple element transaction is that parties to it cannot expect the 'free element' to actually be supplied for free, the consideration paid for the entire transaction should also be considered to be paid for the 'free' element. This can be the case for multiple element supplies where the 'free' elements have an absolute and relatively high value, for 'combination deals', for certain multiple element supplies where the customer has no choice whether to accept the free element and for multiple element supplies where the free element is an explicit part of a negotiated deal. In some of the latter situations, it is relevant to determine whether the ´free element´ can be qualified as a ´marketing incentive´, in which case that element should be considered to be supplied for no consideration.

Once it is established what elements to a composite, multiple element supply are made for consideration and what elements are actually supplied for no consideration, the question arises how to allocate the consideration to the relevant elements. I will elaborate on that in the next Section (Section 4.6).

4.6 How to allocate the total consideration to the different elements of a multiple-element transaction

After establishing which elements in a multi-element transaction are made for consideration, it has to be determined which part of the total consideration paid is actually attributable to which element. It is possible that the multiple-element transaction consists of individually priced elements, e.g. a transaction concerning a trolley filled with groceries in a supermarket. A single amount will be paid at checkout, but it is clear which part of the consideration is paid for which element. It can be more difficult when only a single price is agreed for a multiple element supply. Establishing and applying the correct rules for apportionment is relevant because the supply of each different element may have a different VAT treatment, such as the applicable VAT rate, a VAT exemption, the place of supply etc.

When nothing is agreed about the apportionment of a consideration for a multiple-element transaction, different methods could be used for determining the apportionment. Some examples of possible apportionment methods, as found in CJEU case law and opinions of Advocate-Generals to the CJEU, are based on:

- the market value of the various elements as provided separately by the taxable person (i.e. advertised sales price, JB),[473]
- the market value of the various elements as provided separately by third parties (i.e. open market value, JB),[474]
- using the original cost of the separate elements (in- or excluding apportioned overhead costs),[475]
- the updated or present (actual) cost of the separate elements (in- or excluding apportioned overhead costs),[476] and
- the cost of each element (in- or excluding apportioned overhead costs) and adding a fixed profit margin.[477]

No explicit method for apportioning the total consideration to different elements of a multiple-element transaction is included in or prescribed by the EU VAT Directive. The 'cost' of goods and services is used for determining the taxable amount in case these goods and services are 'deemed' to be supplied for consideration,[478] but these taxed supplies are intended to avoid non-taxation of consumption. The same result could have been achieved by (retroactively) disallowing deduction of the VAT on the purchase of these goods and services.[479] Therefore, it makes sense to use the cost as taxable amount for these deemed supplies. However, in my view, this rationale, i.e. using a cost-based method, should not apply to apportioning an actual consideration to various elements of a multiple-element transaction.

VAT is a consumption tax designed to be borne by the final consumer. VAT is precisely proportional to the price of the goods and services.[480] This implies in my view that the actual price of the various elements, as it would have been charged if these elements were sold separately, should be used as a method for determining the apportionment of the total consideration. The actual price is therefore, in this view, the (advertised) market value of the separate elements. This method would also ensure that situations that are similar from an economic or commercial point of view are treated identically

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473 CJEU opinion of A-G Léger in case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:283, paragraph 68.

474 CJEU opinion of A-G Léger in case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:283, paragraph 73.

475 CJEU opinion of A-G Léger in case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:283, paragraph 69.

476 This is more relevant in cases where goods (or services) are used whose value fluctuates (decreases or increases) over time, like some real estate or intellectual property rights. The mechanics can be derived from, for example, CJEU case C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573, paragraph 14.

477 CJEU opinion of A-G Léger in case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:283, paragraph 70.

478 See Art. 16, 26, 74 and 75 of the EU VAT Directive.

479 See the Explanatory Memorandum to the Proposal for a second Council directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added, COM (65) 144 final, 13 April 1965, Supplement to the Bulletin of the European Economic Community No. 5, 1965.

480 Art. 1(2) of the EU VAT Directive.

as regards the application of the VAT system, which ensures the neutrality of the VAT system.[481]

It should be clear that using the (advertised) market value of the elements in a multiple-element transaction for allocating the total consideration to the various elements should not result in a taxable person being conceded to the right to use that method to reduce his tax liability by artificially inflating the taxable amount subject to lower VAT rates.[482]

If it is not possible to identify the market value of certain elements, or if a business can prove that the method based on the criterion of actual costs reflects the actual structure of the multiple-element transaction (more) accurately than the method based on the (advertised) market value, the actual cost method may also be applied.[483]

The above methods for allocating the total consideration received for a multiple-element supply to its various elements, is supported by CJEU case law.[484]

4.7 VAT deduction and the difference between 'free elements' and 'paid for-elements'

The supply of all elements to a multiple-element supply that is made for consideration is subject to VAT. Where part of the total consideration has to be allocated to an element, this is obvious, as the supply is made for consideration by definition. For the elements that are actually supplied 'free of charge', the EU VAT rules dictate that in most cases, these supplies should be treated 'as if they were made for consideration'.[485] This means that VAT deduction should not be affected by the fact that the supplies are made free of charge.[486] Where no VAT is charged on the supply of these free elements, VAT deduction is also still ensured under the relevant EU VAT rules.[487] This means that VAT deduction should not be affected by the answer to the question whether certain elements to a multiple-element supply are made free of charge. I will elaborate on the VAT treatment of supplies for no consideration in Chapter 6.

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481 CJEU case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:591, par. 30 and 34.

482 CJEU case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:591, par. 31 and 32.

483 CJEU case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:591, par. 35, 36 and 41.

484 See CJEU joined cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel (Case C-308/96), and between T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise (Case C-94/97), ECLI:EU:C:1998:182, and CJEU case C-291/03, MyTravel plc v Commissioners of Customs & Excise, ECLI:EU:C:2005:591.

485 See Articles 16 and 26 of the EU VAT Directive.

486 See Article 168 of the EU VAT Directive.

487 See, for example, Article 185(2) of the EU VAT Directive.

4.8 Conclusion: the VAT treatment of composite supplies

In this Chapter, I have described the VAT treatment of composite supplies. As a main rule, all supplies, or elements to a multiple-element supply, should be considered separately for determining the VAT treatment of those supplies. This is different where economic and commercial reality dictates that the multiple-element supply should be treated as a single, composite supply, for example in cases of absorption or amalgamation.

Where one or more elements to a multiple-element (or composite) supply are advertised as 'free of charge', economic and commercial reality may dictate that these 'free supplies' should actually be treated as being made for consideration from a VAT perspective. This means that in some cases, the total consideration received for a multiple-element supply where some of the elements are advertised as 'free', should still be allocated to these 'free' elements as well.

Where one price is paid or received for a multiple-element transaction, this price will have to be allocated to its various elements. This allocation should be based on the advertised price of the various elements, unless these prices are not known or where this allocation method would not accurately reflect the actual cost structure of the composite transaction. In that case, the 'actual cost method' would be the best alternative.

VAT deduction should not be affected by the answer to the question whether certain elements to a composite transaction are supplied for free.

5 Discounts and rebates

5.1 Introduction

In this chapter I will discuss the effect of discounts and rebates on the VAT position of the supplier and, where relevant, the purchaser of goods or services. As mentioned in Chapter 0, discounts are part of the promotional mix, making purchases more attractive to customers.

In the dictionary, a discount is described as a 'deduction from the usual cost of something'[488] and a rebate is described as 'a partial refund to someone who has paid too much for tax, rent, or a utility'.[489] Specific forms of rebates are cash-backs, described as 'a form of incentive offered to buyers of certain products whereby they receive a cash refund after making their purchase'.[490] This means that both concepts lead to a price decrease, where a discount is deducted from the actual payment or consideration for the supply and a rebate is granted in the form of a refund of part of the consideration that was originally paid. The cash back is a specific species of rebate.

I have listed a number of reasons (non-exhaustive) for businesses to offer discounts and rebates:[491]

- Increase traffic,[492]
- Increase sales,[493]
- Meet sales targets,[494]
- Create stronger client relationships,[495]
- Monetise inventory,[496]
- Promote prompt payment,[497] and

488 Oxford Dictionaries online, © 2017 Oxford University Press, to be accessed online at https://en.oxforddictionaries.com/definition/discount (last accessed on 24 February 2019).

489 Oxford Dictionaries online, © 2017 Oxford University Press, to be accessed online at https://en.oxforddictionaries.com/definition/rebate (last accessed on 7 November 2017).

490 Oxford Dictionaries online, © 2017 Oxford University Press, to be accessed online at https://en.oxforddictionaries.com/definition/cashback (last accessed on 7 November 2017).

491 I found many of these reasons online in a small article by Michelle Rubio on http://smallbusinessesdoitbetter.com. The following link allows access to the article (last accessed on 7 November 2017): http://smallbusinessesdoitbetter.com/2013/02/5-reasons-why-you-should-offer-discounts/

492 Increased traffic means more people will come into a shop or visit an online shop if discounts are offered. More traffic means more potential buyers.

493 Not limited to the discounted products – often, customers that are in a store or visit a web shop also spend money on other items besides (or instead of) the discounted offers. A volume discount is a specific type of discount aimed at increasing sales volumes.

494 Influencing customer behaviour can increase sales of specific items, helping businesses or sales people to meet their sales targets.

495 Giving your customers a better price for a quality products can greatly improve their loyalty to a business, especially first time buyers.

496 Discounting items allows businesses to dispose of old inventory and even items that they don't plan on selling anymore.

497 These are called 'prompt payment discounts', 'early payment discounts' or 'cash discounts'.

- Promote certain payment methods.[498]

The VAT treatment of discounts or rebates should not be affected by the use of vouchers for obtaining these discounts or rebates. Specific types or discounts and rebates, leapfrogging over one or more parties in a transaction chain, require specific attention and they are researched in-depth in this Section. These 'cash backs' and 'money off' schemes usually require the use of vouchers, issued by the party in the chain granting the 'cash back' or 'money off' to a customer at the end of the production and distribution chain. Effectively, these 'discounts' should be treated as third party payments with a right to deduct the VAT included in that payment. I will provide the scientific basis for that view in this Section.

5.2 Conditional and unconditional discounts and rebates

A discount or rebate can be unconditional or conditional. Unconditional discounts are discounts offered without the customers that benefit from the discount have to meet certain conditions, e.g. a certain percentage off the price of a specific good. Conditional discounts can be divided into three categories of conditions:

- conditions that cannot be influenced by customers,
- conditions that need to be met by the customers, and
- conditions that require the customer to actually do something in return for the discount.

Examples of the first type of discounts are discounts where a discount, e.g. a percentage off the price, is determined by the outside temperature or the age of the customer, or discounts that only apply for a very limited amount of time (the condition being that the transaction is concluded within that time).

Examples of the second type of discounts are prompt payment discounts, volume discounts but also the examples I use in Chapter 7, e.g. a discount off the price of a pan at a certain retail chain if customers hand in an(y) old pan, or a discount granted to all children handing in a finished colouring picture or all customers that hand in a correctly solved puzzle.[499] In my view, having to hand in a fee money-off coupon in return for a discount also qualifies as a conditional discount.

An example of the third type of discount is successfully organising a party where products are sold in return for a discount off the price of one of the offered products. As I explain in Chapter 7, from a VAT perspective, this is not really a discount but a (taxable) barter transaction where the amount of the discount is considered to represent the value of the consideration for a service, i.e. organising a successful sales party. Since I discuss the VAT treatment of barter transactions in Chapter 7, I will not discuss these types of promotional activities in this Chapter.

498 Preferred payment method discounts are offer to customers, e.g. to avoid paying fees on credit card transactions.

499 This is different from the situation where a discount is granted to the winner or a limited number of winners of a puzzle competition. I will discuss the VAT consequences of that type of promitional activity in Chapter 8.

Coupons and other types of vouchers are often used to demonstrate the right to a discount or rebate. I will discuss the VAT specifics of vouchers in Chapter 9. In this Chapter, I will discuss the basic VAT mechanics of discounts and rebates.

5.3 Discounts and rebates versus free supplies

The terms 'discounts' and 'rebates' cannot be applied to reductions covering the whole cost of supplying redemption goods, i.e. the full advertised price.[500] I discuss the VAT consequences of free supplies in Chapter 6.

Discounts or rebates and free supplies are treated differently from a VAT perspective. In case of a discount or rebate, the business making a supply for which it offers a discount or rebate only has to (ultimately) account for and pay VAT on the amount of the consideration actually received in return for that supply, as I will explain below. This is even the case if the consideration is extremely low or even symbolic: as long as parties have agreed to make a supply in return for consideration, the value of that consideration is the taxable amount. [501] This may be different if Member States have implemented specific measures that would allow them to use an 'open market value' instead of the actual amount received but using the actual amount as taxable amount is the main rule.[502]

If the business receives no consideration at all, it will have to apply the provisions regarding 'deemed supplies', which means that the business may have to account for and pay VAT on a fixed amount, as described in Chapter 6. For goods, this is the purchase price of the goods or similar goods or, in the absence of a purchase price, the cost price, determined at the time when the deemed supply takes place.[503] For services, the taxable amount shall be the full cost to the taxable person of providing the services.[504] This means that if a very low consideration is charged because a substantial discount is granted, VAT is only due on the discounted amount, i.e. the actual consideration received, whereas if no consideration is received, a business will have to remit VAT on the cost of the supply. This is how the VAT mechanics work. In practice, from a marketing perspective, giving away goods or services for free is more attractive than selling goods or services, however low the price. Businesses then have to accept the 'additional VAT cost'.

If the business that supplies the promotional goods or services advertises a price for these goods or service and where the customer makes a 'payment in kind' – e.g. by providing proof of 'loyalty' – the value of the consideration in kind has to be added to

500 See, for example, CJEU case C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 17.

501 See CJEU case C-412/03, Hotel Scandic Gåsabäck AB v Riksskatteverket, ECLI:EU:C:2005:47, paragraphs 25 and 26.

502 See Art. 80 of the EU VAT Directive.

503 See Art. 74 of the EU VAT Directive.

504 See Art. 75 of the EU VAT Directive.

the low cash payment, to an amount equal to the difference between the advertised price and the actual cash payment.[505]

5.3.1 The open market value – reassessing the agreed consideration

Discounts and rebates decrease the price of transactions. In some cases, related parties may want to lower the prices of the transactions as performed between them in order to optimise their VAT position. Examples are lowering the agreed price of a supply to a related party that cannot (fully) deduct VAT in order to minimize the amount of non-deductible VAT or increasing the price of a taxed supply made by a business that cannot fully reclaim VAT in order to improve its VAT recovery right.

The only thing that Member States can do if they want to avoid the risk[506] that businesses charge symbolic prices[507] for supplies where they would then have to remit VAT only on the low (symbolic) consideration (i.e. where there is not also a consideration in kind), is to implement the provisions from the EU VAT Directive that allow them to use the 'open market value' as the taxable amount for certain specific transactions.[508,509] In this respect, 'open market value' shall mean the full amount that, in order to obtain the goods or services in question at the time of the supply, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax. Where no comparable supply of goods can be ascertained, 'open market value' shall mean an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply. Where no comparable supply of services can be ascertained, 'open market value' shall mean an amount that is not less than the full cost to the taxable person of providing the service.[510] This means that the 'open market value' as used for determining the taxable amount for specific supplies for consideration is the same (or at least as high) as the taxable amount for deemed supplies (or supplies where (part of) the consideration is in kind). Most EU Member States implemented provisions to apply 'open market value' to certain transactions.[511]

505 CJEU case C-230/87, Naturally Yours Cosmetics Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1988:508. Also see Chapter 7.

506 Apparently some Member States percieve it as a real risk that the payment of VAT could to a large extent be avoided if taxable persons or their employees were able to acquire goods or services for a symbolic sum and be taxed on the basis of that consideration: CJEU case C-412/03, Hotel Scandic Gåsabäck AB v Riksskatteverket, ECLI:EU:C:2005:47, paragraph 25.

507 The same applies, mutatis mutandis, to situations where the price is artificially inflated.

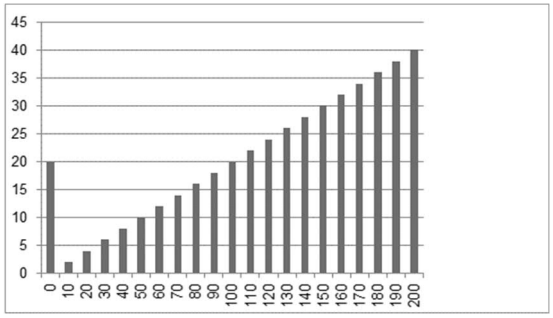
508 See Art. 80 of the EU VAT Directive.

509 See CJEU case C-412/03, Hotel Scandic Gåsabäck AB v Riksskatteverket, ECLI:EU:C:2005:47, paragraph 26.

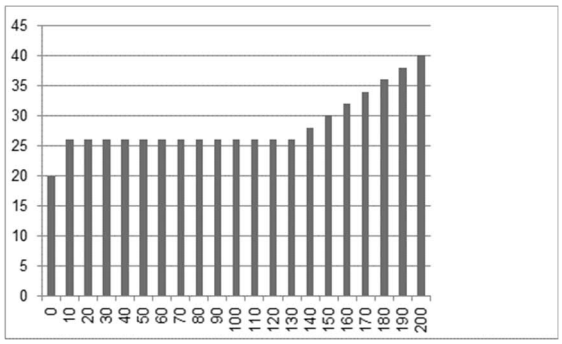
510 See Art. 72 of the EU VAT Directive.

511 See the list of options provided for under Council Directive 2006/112/EC for which notification by Member States of the VAT Committee is envisaged, published as a Notification of the VAT Committee, accessible online via https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/key_documents/vat_committee/notifications.pdf (last accessed on 8 November 2017).

The above can be shown in the two diagrams below, where I compare a situation where a Member State that has not implemented the 'open market value' provisions to a Member State that has done so. In both examples, the applicable VAT rate is 20%, there is a supply of goods which would cost the business, at the time of the supply, Euro 100 (ex VAT) and which would have an 'open market value' of Euro 130 (ex VAT). In the tables, the horizontal axis represents the agreed amounts payable, which are increased by steps of Euro 10 (and continue after reaching the Euro 100 and Euro 130 amounts, to demonstrate the workings of the provisions. The vertical axis represents the amount of VAT due. The first diagram shows the VAT amounts due in the Member State that hasn't implemented the 'open market value' provisions. In this Member State, in situations where a very low consideration is agreed and received, a relatively low amount of VAT is due:



In the second diagram, representing the Member State that has implemented the 'open market value' provisions, the VAT amount due on a transaction for no consideration is the same as in the other Member State: 20% of the cost price of the good, i.e. Euro 20. The VAT amount due on every other transaction where a consideration is agreed and received is Euro 26 (20% of Euro 130), until the point that the consideration agreed and received actually exceeds the 'open market value'. Only from that point, the VAT due is actually 20% of the agreed and received consideration:



5.3.2 Open market value: only for determining the taxable amount or more?

Under the relevant provisions, Member States are allowed to take measures to ensure that, in specific cases, the taxable amount in respect of the supply of goods or services is to be the open market value. The categories of transactions in respect of which the actual consideration may be replaced by the open-market value of the goods and services supplied are those, in respect of which:

(a) the consideration is lower than the open-market value and the recipient of the supply is not entitled to full deduction of input VAT;
(b) the consideration for an exempt supply is lower than the open-market value and the supplier is not entitled to full deduction of input VAT; and
(c) the consideration is higher than the open-market value and the supplier is not entitled to full deduction of input VAT.

Do these rules imply that Member States can actually force businesses to adjust their pricing? Or does this mean that, where the 'open market value' should be applied, businesses cannot agree a price that is lower than the VAT amount due on the open market value?

At first sight it appears possible to agree a (gross) price that is lower than the VAT amount due on the 'open market value'. In the example, this would occur at any agreed net consideration below Euro 20.80, which equals a VAT-inclusive consideration of Euro 26, being the minimum VAT amount payable to the tax authorities under the 'open market' rules. If, under that rationale, the supplier in the above examples would charge Euro 20 excluding VAT (and therefore Euro 24 including VAT) for its supply, he would still have to remit Euro 26 to the tax authorities. In other words, he would have to pay more VAT than the total (net) consideration received for his supply – he would make a loss on this transaction. I will discuss and answer both questions below.

In my view, the VAT rules regarding the use of the 'open market value' as taxable amount should not be interpreted as meaning that the actual price as agreed between parties for a transaction should be adjusted. In my view, the relevant VAT rules allow Member States to adjust the VAT consequences of certain types of transactions, but not force businesses to actually change the conditions, such as the agreed price, of a transaction. If businesses feel that they should adjust the actual transaction value, e.g. by adjusting the invoices issued for the relevant transaction, this is up to them. Whether this always has the desired effect may also depend on local rules regarding, for example, the statute of limitations. The actual wording of the provision suggests this as well (underlining by me, JB): "In order to prevent tax evasion or avoidance, Member States may (…) take measures to ensure that (…) the taxable amount is to be the open market value". The taxable amount is a very specific Union VAT concept, unlike concepts such as 'price'. Also, the rule states nothing about the consideration, also a specific Union VAT concept, but only mentions the taxable amount.

Even though the relevant provision only allows Member States to ensure that the taxable amount for specific transactions is to be the open market value, two out of the tree situations where Member States are allowed to do so in order to prevent tax evasion or avoidance seem to require that not only the 'taxable amount' for the specific transactions, but also their value in the sense of 'turnover' for calculating the deductible proportion under Article 174 of the EU VAT Directive. Where the consideration for an exempt supply is lower than the open-market value and the supplier is not entitled to full deduction of input VAT (Article 80(1)(b) of the EU VAT Directive) and the consideration is higher than the open-market value and the supplier is not entitled to full deduction of input VAT (Article 80(1)(c) of the EU VAT Directive), the avoidance or evasion would consist of improving the overall VAT deduction right or pro rata of the supplier.[512] Ensuring this does not happen would require the 'turnover' from Article 174 to be based on the open market value of the relevant transactions, as mentioned above. In my view, this means that the relevant provisions should be clarified or adjusted accordingly. Also, where a business has the obligation to issue an invoice for its supplies, this invoice will have to include the 'taxable amount'.[513]

Back to the questions from the beginning of this Section: can Member States use EU VAT rules to demand that taxable persons change a price that they agreed with other parties to a contract that is binding under civil (or comparable) law? My view is that this is not the case, also because it is not necessary to achieve the specific goal of the provisions. It would, however, be necessary that the adjusted taxable amount, in situations where the agreed consideration is ignored, and the open market value is used as a taxable amount, is used to determine the VAT position of all parties to that transaction. The VAT amount payable should be the same amount that is used as a basis for determining the amount of deductible VAT in order to avoid unjust enrichment of any of the parties involved or the local tax authorities, as the following example will demonstrate:

> Example:
> Company A is a business that has a full VAT recovery right. Affiliated Company B can only deduct 50% of the VAT on its (general) cost. The applicable VAT rate is 20%.
> Company A performs a service for Company B, for which it charges and receives a VAT inclusive consideration of 120. The open market value of the service would be
> 300 (excluding VAT).
>
> Without applying the open market value rules, Company B would pay Company A an amount of 120, Company A would remit 20 (the VAT amount) to the tax

512 See Article 173-175 of the EU VAT Directive. The pro rata calculation uses turnover, not taxable amounts. Lowering the turnover from exempt supplies and increasing the turnover from taxed supplies would have a favourable impact on the supplier's pro rata.

513 See Article 226(8) of the EU VAT Directive.

authorities and Company B would recover 10 (50% of 20) from the tax authorities.
The net result for the tax authorities would be 10, the same as the VAT cost for Company B.

Under the application of the 'open market value' provisions, Company B should have remitted 60 (20% of 300) to the tax authorities, of which Company B could have
deducted 30.
The net result for the tax authorities would be 30, the same as the VAT cost for Company B.

This net-result can be achieved by re-assessing the VAT position of both parties: Company A will have to pay an additional VAT amount of 40 and Company B gets a(n additional) VAT credit to the amount of 20.
The net result for the tax authorities would be 30, the same as the total VAT cost for Company A (the re-assessed 40 not paid by/charged to Company B) and Company B (the non-recoverable 10 from the 20 originally charged by company A, minus the credit of 20) together.

Also, if the related third party as a customer has a right to deduct input VAT, the result of applying the 'open market value' only to the value of the supply made by the supplier that has a limited right to deduct VAT,[514] without adjusting the transaction value on the customer side, would be that the deducted VAT amount would exceed the VAT amount actually remitted, which would cost the tax authorities money. In my view, the EU legislator has not intended to introduce a measure aimed at tax evasion or avoidance that can result in the tax authorities collecting less VAT.

Can the agreed value of a supply be lower than the VAT due as a result of applying the 'open market value' rules? I think that this is the case. Returning to the original example from the beginning of this section, if the supplier and his customer would agree on a price of 20 excluding VAT, in my view, the supplier would not have to issue an invoice for the agreed net amount of Euro 20 and charge a VAT amount of Euro 26 (the VAT due on the open market value), making the total invoice price Euro 46. In my view, the price actually agreed between the parties is the price paid (in the example: Euro 24) to the business, who will have to remit Euro 26 to the tax authorities. The fact that he makes a loss on this transaction does not change that, although it could mean that from an economic point of view, it would be unwise to agree to a consideration that is not sufficient to cover the VAT that is due on the transaction. But in my view, parties are allowed to decide differently. Just not always for VAT.

514 The third situation mentioned in Article 80 of the EU VAT Directive.

5.4 The VAT consequences of discounts and rebates

A basic principle of the current EU VAT system is that it is intended to tax only the final consumer. According to the CJEU, this means that the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot – as a main rule – exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him. It follows that the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer.[515] This means that if the final consumer pays less than the advertised price, e.g. because a discount is granted, no VAT should be levied on the amount of the discount. As I will explain in Section 5.5,in my view this is not a 'basic principle of EU VAT' at all. In my view, 'consideration paid by the final consumer' should include payments made by other person than the recipient of the supply, e.g. third-party payments. I refer to Section 5.5.

The fact that the taxable amount cannot exceed what is actually paid by or on behalf of the final consumer was confirmed on several occasions by the CJEU, also in a specific case where the Belgian tax authorities wanted to levy VAT on amounts that contractually could have been charged by a taxable business to its customer (the Connoisseur Belgium case).[516] The taxable business had calculated its price without taking certain costs into account, even though the contract between the parties stipulated that certain cost elements should have been included in the price. The CJEU held (in an order) that value added tax is not due on costs or amounts that could contractually have been charged, but were not, by the taxable person to the other contracting party.

5.4.1 Discounts at the time of the supply

The relevant EU VAT rules state that the taxable amount shall not include price discounts and rebates granted to the customer and obtained by him at the time of the supply.[517] This is in line with the rules as described above.

5.4.2 Discounts in kind?

Some people describe goods or services given away for free with certain (quantities of) purchases as 'discounts in kind'. These transactions are accounted for in some ERP systems as 'discounts in kind' as well.[518] In my view, the supply of free goods is not a discount. In my view, there is no such thing as a 'discount in kind', as the advertised price for the advertised product is not decreased, but the advertised product is

515 See CJEU case C- C-317/94, Elida Gibbs Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1996:400, paragraphs 19 and 24.

516 CJEU case C-69/11, Connoisseur Belgium BVBA v Belgische Staat, ECLI:EU:C:2011:825. The full text of the order is only available in French and Dutch.

517 Article 79(b) of the EU VAT Directive.

518 For example, SAP knows this functionality, as can be found on-line, for example, on https://blogs.sap.com/2016/08/page/56/.

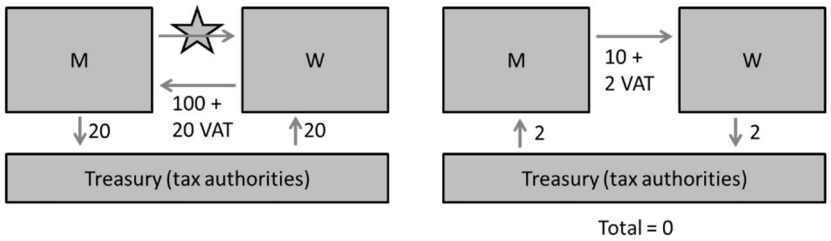
changed (by adding products but without changing the price). I discuss the supply of free goods and the supply of goods perceived as being supplied for free in Chapter 6.

5.4.3 Rebates (discounts granted after original payment was made) – 'money off schemes' and 'cash back schemes'

Under the EU VAT rules, in cases where discounts are granted after the supply takes place (i.e. rebates), the taxable amount shall be reduced accordingly.[519] This provision was introduced to make sure VAT was only paid on the consideration actually received for the transaction.[520] The EU VAT rules contain a provision that ensures that the VAT on this transaction that was deducted by the recipient of the goods or services receiving the discount or rebate is also adjusted.[521] This way, the part of the 'VAT overpayment' refunded to the supplier balances out the 'overdeducted VAT amount' that has to be adjusted by the purchaser.

For a transaction between two fully taxable businesses, rebates have no net effect on the VAT position of those businesses.[522] This is different for transactions between a business and a private consumer. In a simple diagram, this can be illustrated as follows (the arrows with numbers in the diagrams represent payments, arrows with symbols (e.g. ☆) represent supplies, boxes represent taxable persons and circles represent private individuals/non-taxable persons,[523] and the applicable VAT rate is 20%):

Diagram 1



In *Diagram 1*, Manufacturer (M) supplies goods to Wholesaler (W) for a taxable amount of 100, on which it charges 20% VAT. Therefore, W pays M a total amount of 120. The VAT element of this payment, 20, is remitted by M to the tax authorities. W can deduct this VAT amount. Subsequently, M grants W a rebate (VAT inclusive) of 12. This means

519 Art. 90 of the EU VAT Directive.

520 Proposal for a sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950, Bulletin of the European Communities, Supplement 11/73, page 10.

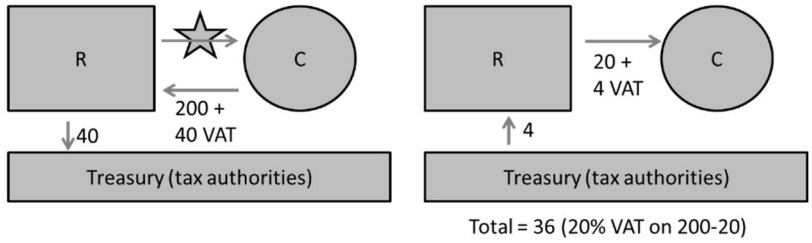
521 Art. 185(1) of the EU VAT Directive.

522 This is different for businesses that perform both taxed and exempt supplies. The deduction of VAT on costs that are not directly attributable to specific (taxed or exempt) activities, the so-called "general costs", is generally based on the proportion of the turnover for all taxed activities divided by the turnover for all taxable activities, see CJEU case C-29/08, *Skatteverket v AB SKF*, ECLI:EU:C:2009:665, paragraph 73.

523 Circles can also be taken to represent businesses wihout any right to deduct VAT.

that M will have only received a total (net) amount of 90 (100-10) for its supply to W. M has initially remitted a VAT amount of 20 to the tax authorities. M can now get back the VAT on the amount of the rebate: 2. This means that M will have paid VAT on the net amount of 90, being 18. W will have to pay back 2 of the 20 VAT it initially deducted. The net effect for the treasury is 0, as should be the case in respect of transactions between fully taxable businesses.

Diagram 2



Total = 36 (20% VAT on 200-20)

In *Diagram 2*, Retailer (R) supplies goods to customer (C, a private individual with no right to deduct VAT) for a taxable amount of 200, on which it charges 20% VAT. Therefore, C pays R a total amount of 240. The VAT element of this payment, 40, is remitted by R to the tax authorities. Subsequently, R grants C a rebate (VAT inclusive) of 24. This means that R will have only received a total net amount of 180 (200-20) for its supply to C. R has initially remitted a VAT amount of 40 to the tax authorities. R can now get back the VAT on the amount of the rebate: 4. This means that R will have paid VAT on the net amount of 180, being 36. The net effect for the treasury is a reduction of the VAT amount received for this transaction: a total VAT amount of 36 (20% VAT on 200-20) is collected for this transaction.

5.4.4 Rebates granted by another person than the party making the (direct) supply: leapfrogging.

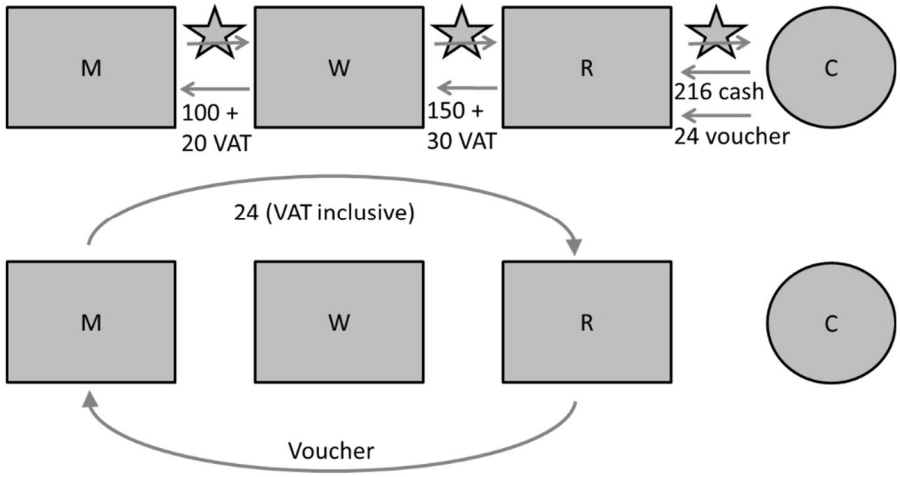
In practice, rebates are not only granted by the actual supplier of a product to its own (direct, contractual) customers, but also – for example – by manufacturers of products to the ultimate buyers of these products at the end of a distribution chain. The reason for this could be that a manufacturer wishes to make his own product more appealing to end consumers by lowering the retail price of the product, by granting the purchaser a 'cash back' or 'money off' (both species of rebates), because if he would grant the rebate to his own purchasers, he would not be certain that this rebate would (sufficiently) decrease the price charged by the retailer to the final consumer. This rebate system can be described as 'leapfrogging', because it looks as if rebate 'leapfrogs' one or more links in the production and distribution chain.[524]

524 See the Opinion of Advocate General Jacobs in case C-427/98, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2002:90, par. 31. According to the Advocate General, the nature of 'leapfrogging' schemes is such that they almost inevitably apply only to goods and only when the goods concerned are not noticeably transformed by the transactions in the chain – the aim of the business granting the discount is to promote the sale of his own goods, not of goods (or services) incorporating his supply.

The VAT issues related to these types of rebates are very specific. This is caused by the fact that the current provisions in the EU VAT system don't provide for a specific treatment of these rebates. This inadequacy of the VAT system has, in turn, lead to questionable interpretation and application of the relevant rules.[525] In an attempt to solve these problems, the Commission included a 'solution' in its original voucher-proposal.[526] A large part of this proposal was focused on the VAT treatments of the types of rebates that I will focus on in this Section. This part of the original proposal was, however, not included in the final, new EU VAT voucher rules.

When a manufacturer grants a 'leapfrog' rebate to a buyer of its products further down the production and distribution chain (usually the final customer), this is usually done by providing the purchasers of such products with vouchers with a specific face value, which can be used in either of two ways. In the first scenario, the purchaser can use the voucher as (partial) payment for the supply of the product from a retailer. In this scenario, the retailer accepts the voucher as 'payment' from the purchaser because the value of the voucher will be reimbursed by the manufacturer of the product. I will refer to this discount system as the 'money off scheme', because to the purchaser, the voucher represents a price reduction when purchasing the product from his supplier (the retailer). To the customer, this is actually a discount rather than a rebate. It can be illustrated in a diagram as follows:

Diagram 3 – "money off scheme"



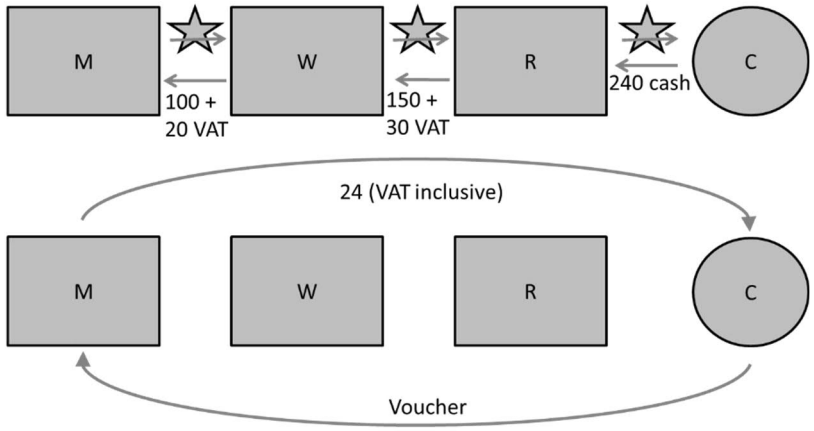
525 The European Commission acknowledges this in the Explanatory Memorandum to its Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, page 9, not yet published in the Official Journal, on-line source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF.

526 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, on-line source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF.

In this diagram (*Diagram 3*), the customer (C) uses a voucher representing 10% of the VAT inclusive retail price (240) to partially 'pay' the retailer (R), who supplies a good at the agreed (VAT inclusive) price of 240 (where 200 is the taxable amount and 40 the VAT due on the supply). The remaining consideration is paid in cash (to the amount of 216). R sends the voucher to the manufacturer of the goods (M) and receives the amount of its face value (24) in return. From the perspective of R, the payment by M (to R) is considered a 'consideration obtained or to be obtained from a third party',[527] and therefore included in the taxable amount for the supply by R to C.[528] This way, the amount received by R is not affected by the 'money off scheme', but the total amount received by M is reduced by 24. For M, from an economic perspective, it does not matter whether he reimburses W part of the sales price or whether he 'leapfrogs' some links of the chain, granting a party further down the chain a discount. Either way, the amount that M perceives as the consideration 'finally received' for his supply is affected.[529]

In the second scenario, the same manufacturer grants the ultimate purchaser of its product the same amount as a rebate under what I will refer to as a 'cash back scheme'. In this scenario, the retailer is not involved in the actual granting of this rebate. The customer will send the voucher directly to the manufacturer, who will pay it the face value of the voucher in return. This scenario can be illustrated in a diagram as follows:

Diagram 4 – "cash back scheme"



In this diagram (*Diagram 4*), the customer (C) pays the retailer (R) for the supply of a good at the agreed (VAT inclusive) price of 240 (200 as taxable amount, 40 being the VAT due on the supply). C sends the voucher directly to the manufacturer (M) and

527 See Article 73 of the EU VAT Directive.

528 CJEU case C-427/98, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2002:581, par. 46.

529 CJEU case C-427/98, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2002:581, par. 45.

receives the amount of the face value of the voucher (24) in return. Again, the amount received by R is not affected. In this instance, similar to the 'money off scheme', the payment by M could possibly be regarded as 'third party payment' because at the end of the day, M funds part of this transaction.[530] As under the 'money off scheme', the final amount received by M for 'his supply' is reduced (by 24).[531]

Questions regarding the VAT consequences of both schemes (the "money off scheme" and the "cash back scheme") were first referred to the CJEU for a preliminary ruling in the Elida Gibbs-case.[532,533]

5.4.5 Elida Gibbs

Elida Gibbs was a UK based subsidiary of Unilever that manufactured toiletries. To promote retail sales of its products, Elida Gibbs operated both the 'money off scheme' as well as the 'cash back scheme' I described above. Elida Gibbs initially remitted VAT on the full amount of the consideration received from the (in my earlier examples) wholesalers for its sales to these wholesalers. At some point, Elida Gibbs decided that this was not correct, and asked for a refund of overpaid VAT to the amount of the VAT on the value of the considerations received from the wholesalers less the amounts it had to pay out for redemption of the vouchers by the retailers (under the 'money off scheme') and by the purchasers of the goods (under the 'cash back scheme'). In essence, Elida Gibbs considered these payments as 'retroactive discounts' and rebates, which reduced the (original) taxable amount.[534] The Commissioners rejected the claims, taking the view that there was no retroactive discount.

In a diagram, Elida Gibbs' view can be illustrated as follows (Diagram 5 for the 'money off scheme' and Diagram 6 for the 'cash back scheme'), where Elida Gibbs is symbolised by 'M':

530 The CJEU, ruling on both types of incentive (money off and cash-back) in the same case, refers to this as "a portion of the consideration (…) made available on behalf of the final consumer" (CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 46).

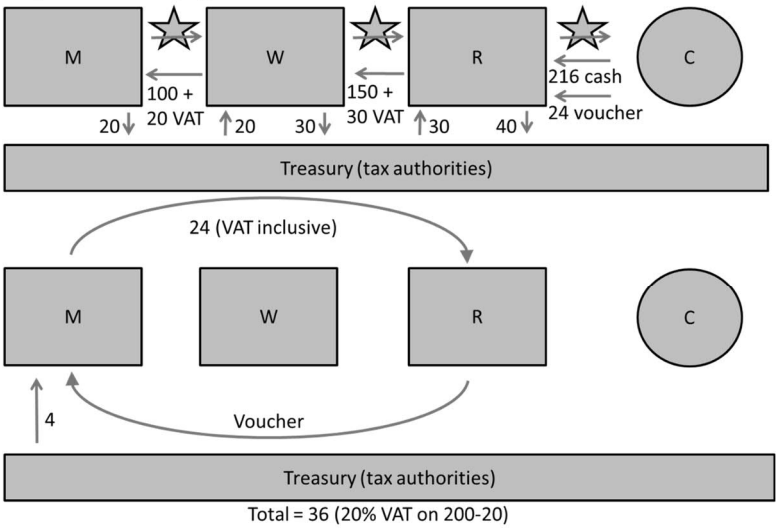
531 As the Advocate General points out in CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:90, par. 31, the nature of these type of schemes is such that they almost inevitably apply only to goods and only when the goods concerned are not noticeably transformed by the transactions in the chain – the aim of the wholesaler is to promote his own goods, not of goods incorporating his supplies.

532 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400.

533 After the first referral in the Elida Gibbs case, the same or similar principles were tested (by referrals or actions against Member States to the CJEU) in cases C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, case C-300/12, Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH, ECLI:EU:C:2014:8, and C-462/16, Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG, ECLI:EU:C:2017:1006.

534 Art. 90(1) of the EU VAT Directive.

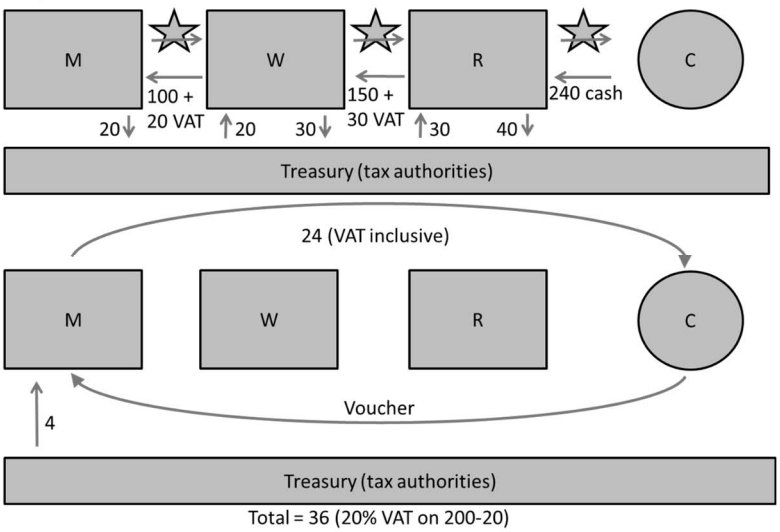
Diagram 5 – "money off scheme"



Total = 36 (20% VAT on 200-20)

* The 40 VAT remitted can also be divided into 36 for the initial payment and 4 for the amount received for the voucher. The net result stays the same.

Diagram 6 – "cash back scheme"



Total = 36 (20% VAT on 200-20)

Elida Gibbs challenged the Commissioners' rejection. The relevant court, entertaining doubts as to the interpretation of the relevant Community (now: Union, JB) provisions, referred a number of questions to the CJEU for a preliminary ruling.

The CJEU ruled in favour of Elida Gibbs, allowing Elida Gibbs to decrease the taxable amount for its sales (to the wholesalers) with the amount paid to the retailers (under the 'money off' scheme) or the customer (under the 'cash back' scheme). In my view, a

pivotal part of the ruling can be found in paragraph 31 of the ruling,[535] in which the CJEU states the following:

> "It is true that that provision (the current Art. 95 of the EU VAT Directive, JB) refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently. The fact remains, however, that the provision is an expression of the principle, emphasized above, that the position of taxable persons must be neutral. It follows therefore from that provision that, in order to ensure observance of the principle of neutrality, account should be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction through retailers or by direct repayment of the value of the coupons. Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person."

Before I explain why, in my view, this ruling and subsequent CJEU rulings on some of the exact same points of law[536] are not entirely in line with the EU VAT system (even though they are based on 'economic reality', without the CJEU explicitly saying so), I will first elaborate on some relevant facts as well as the principles applied in these cases.[537],[538]

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535 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 31.

536 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581 and C-462/16, Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG, ECLI:EU:C:2017:1006.

537 Contrary to what I expected, there is not a lot of literature specifically about the Elida Gibbs-case. Also, most scholars agree that the decision from the CJEU is in line with the purpose of VAT. There are differences in the exact interprestation of the case that I will discuss throughout this chapter, but all autors I read agreed with the result of the case. In this respect, I refer to: Pagan, Jill C.: UK Budget Shows Government Will Fight Court Defeats on VAT Issues, Tax Notes International 1996 p.2069-2072, Deborah Butler, 'Non-monetary consideration in the context of VAT: the status of the judgment in Empire Stores v Commissioners of Customs and Excise in the light of later judgments' (2001) 10 EC Tax Review, Issue 4, pp. 234–241 Deborah Butler, 'Elida Gibbs revisited: further thoughts on the extent to which vouchers can constitute consideration for VAT purposes' (2002) 11 EC Tax Review, Issue 2, pp. 71–79 and J. Watson, K. Garcia, EU VAT and the Rule of Economics, 20 Intl. VAT Monitor 3, p. 190-197 (2009), Journals IBFD.

538 Literature about the Elida Gibbs case that is referred to on the EU's official websites and that is published in languages I do not command (sufficiently) is also not very abundant: Novak, Meinhard: St. Galler Europarechtsbriefe 1996 p.438-439 (DE), Weiss, Eberhard: Umsatzsteuer-Rundschau 1997 p.269-271 (DE), X: Revue de jurisprudence fiscale 1997 p.140 (FR), Vorgias, Manos: O prosdiorismos forologiteas vasis gia ton F.P.A. se periptosi parochis ekptoseos. Ep' efkairia ton apofaseon DEK 96/C-288/94 kai 96/C-317/94, Deltio Forologikis Nomothesias 1998 p.595-599 (EL), Cardia, Carlo Geronimo ; Genna, Innocenzo Maria: Tributi 1998 nº 2/3 p.227-232 (IT), Slapio, Ursula: Umsatzsteuerliche Bemessungsgrundlage bei Preisnachlässen des Herstellers an Endkunden, Internationales Steuerrecht 1998 p.502-504 (DE), Maublanc, Jean-Pierre: Chronique fiscale communautaire (jurisprudence). Réductions de prix et base d'imposition à la TVA, Revue du marché commun et de l'Union européenne 1999 p.350-353 (FR) and Gissel, Lutz: Kehrtwende für die bisherige BFH-Rechtsprechung zur Verkaufsförderung durch Vermittler, Umsatzsteuer-Rundschau 2014 p.222-225 (DE).

5.4.5.1 The 'leapfrog' discount cases only apply to specific transaction chains

First of all, the 'cash back' scheme and the 'money off' scheme that lie at the basis of the Elida Gibbs ruling as well as the subsequent rulings (which I will elaborate on below) are very specific species of rebates (or discounts). This kind of promotional activity almost inevitably only applies to cases that concern goods and only when these goods are not noticeably transformed by the transactions in the distribution chain: the aim of the business granting the 'discount' or 'rebate' is to promote the sale of his own goods, not of goods incorporating or incorporated in his supplies.[539]

To me, this means that in the manufacturer's view, it is still 'his product' that is sold by the other businesses in the distribution chain. If the manufacturer wishes to promote sales of 'his' product by granting the buyer a discount or rebate, in his view as well as from an economic/cost perspective, it does not matter whether he grants this discount to the business that he makes the supply to under a legal agreement or whether he decides to actually grant the discount or rebate to another person further down the distribution chain (usually the final customer), probably to make sure that the discount or rebate actually 'reaches' the final customer, making his product more attractive. This can be described as 'economic reality'.[540]

This reasoning is acknowledged by the CJEU, as can be seen in the paragraph I quoted above. In my view, the CJEU makes reference to the specifics of the supply (i.e. the fact that it concerns a supply of 'own goods that are not noticeably transformed by the transactions in the chain') where it applies the principle of neutrality as well as economic reality when calculating the taxable amount to "situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer", by allowing this taxable person to act as if he granted a discount or rebate 'directly'.[541] You cannot discount a product supplied by another business, only your own.

I find confirmation of my view that the outcome of the Elida Gibbs case only applies to those specific situations in another CJEU case where a (disclosed) agent grants/funds a 'discount' off the price of a supply made by another, 'principal', supplier.[542] The agent granted the discount to promote the sales of the product (a holiday travel), because selling that product would earn him a commission fee. The agent felt that this 'discount' should decrease the taxable amount regarding the supply made by him (i.e. the agency service provided to the principal supplier) because, just as in the Elida Gibbs case, the 'discount' affected the amount 'finally received' by the agent. The CJEU did not agree, arguing that:

539 See the Opinion of the Advocate General in CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:90, par. 31, where he makes this exact point.

540 I elaborate on the possible effect of 'economic reality' on the VAT consequences of transactions in Chapter 2.

541 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 31.

542 CJEU case C-300/12, Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH, ECLI:EU:C:2014:8.

1) The agent did not give a discount on its own services (the services provided in connection with its activity as an intermediary);
2) The principal supplier (which was Elida Gibbs in the Elida Gibbs-case) is not 'at the head of a chain of operations' as it provides its services directly to the final consumer, with the agent intervening as an intermediary in that single transaction only;
3) The agent provides a service, namely as an intermediary, which is totally separate from the service provided by the principal supplier to the final customer; and
4) The principal supplier (which was Elida Gibbs in the Elida Gibbs-case) gives no discount since the agent has to pay him the agreed price, regardless of any 'discount' that the agent gives the final consumer.[543]

The CJEU comes to the conclusion that in the circumstances of this case, the financing by the agent of a part the consideration of a supply which, from the perspective of the final consumer of the service, takes the form of a price reduction of that supply, affects neither the consideration received by the principal supplier for his supply nor the consideration received by the agent for its intermediation service.[544]

To me, this substantiates my view that the business that grants the 'discount' or 'rebate' has to have made a supply of the good earlier in the distribution chain that leads to the supply to the customer to whom the discount or rebate is granted, for it to be considered a discount or rebate under the Elida Gibbs ruling. Only then can the business be considered to be 'at the head of a chain of operations' (cf. the second point above), giving a discount or rebate on its own goods (cf. the first point above), which are the same goods as the ones supplied by the business further down the distribution chain (cf. the third point above). And only then, the money paid by the business at the head of the chain can be considered a discount or rebate in the sense of the Elida Gibbs ruling.

5.4.5.2 Because of the 'leapfrog', the payments may be considered discounts or rebates as well as third party payments

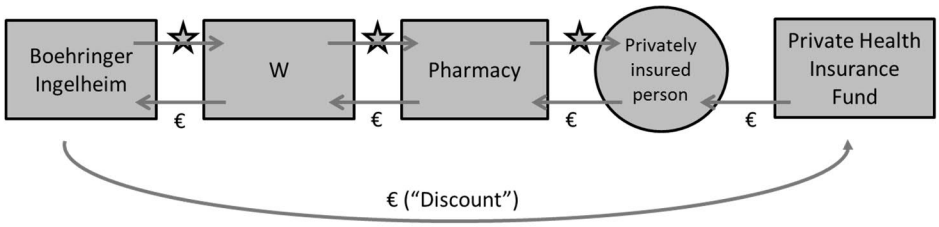
In my view, part of the difficulty of the Elida Gibbs ruling is that the CJEU applies the same solution (treating a payment as a discount that lowers the taxable amount) to two different scenarios. In the money-off scenario, a payment is made by the business bearing the cost of the 'discount' to the last supplier of a good in the chain (that makes the supply directly to the customer) 'on behalf of the customer'. This payment is treated as a third-party payment by that last supplier. In the cash-back scenario, a (or: the same) payment is made by the business bearing the cost of the 'discount', but now it is made to the last customer of that good, invisible to the last supplier, so that it can't be a 'real' (third party) payment in the sense that it is included in the actual

543 CJEU case C-300/12, Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH, ECLI:EU:C:2014:8, par. 27-31.
544 CJEU case C-300/12, Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH, ECLI:EU:C:2014:8, par. 32.

payment made by the customer to the supplier for the supply. It's a 'third party' payment because the business making the payment (to the customer) is not the recipient of the product.

Despite these differences, in both scenarios the payment is treated as a discount for VAT purposes. This can lead to a number of 'problems', as I will explain below.

Things get even more muddled up in the Boehringer Ingelheim case.[545] This case is comparable to the Elida Gibbs case in the sense that goods are sold through a distribution chain where they remain unaltered, and where the first manufacturer in the production and distribution chain, the pharmaceutical company Boehringer Ingelheim, pays a 'discount' to the last entity in the chain that pays for (or funds) these goods (in that case, a private health insurance fund). The biggest difference with the Elida Gibbs case, however, is that the last entity in the chain paying for the goods, the private health insurance fund, never obtains ownership or legal title to these goods and cannot be considered a beneficiary of the supplied products. The only reason the insurance fund is included in this chain is because it has a legal obligation to refund the insured party the purchase price of the products. Under this scheme, it makes sense for Boehringer Ingelheim to pay the discount to the insurance fund, as it bears the ultimate cost of the (last) supply. This can be shown in a diagram as follows:



In the Boehringer Ingelheim case, the 'leapfrog' even jumps over the final consumer. In my view, the Boehringer Ingelheim case resembles a discount granted to a final customer through a third party (the insurance fund). This is different from the Ibero Tours case, because in that case the third party actually funded the discount without 'passing it on' to the 'principal supplier', which is what effectively happens in this case. However, in my view the insurance fund does not pay 'in return for the supply of the product' but as compensation to the insured under an insurance agreement, and the privately insured person has paid insurance premiums for being entitled to that compensation. Therefore, in my view, the payment made by the insurance fund is not made as consideration for the supply of the goods, and the insurance fund is not 'at the end of the distribution chain', as the CJEU suggests. In my view, it is not part of the distribution chain. However, under the economic and commercial reality of the scheme, the mechanics of this case could be described as a cash back system paid via a third party. Different from the Ibero Tours case, the insurance company, although

545 CJEU case C-462/16, *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG*, ECLI:EU:C:2017:1006.

lowering the price of the last supply to the final consumer, does not bear this cost but 'passes it on' to the manufacturer (Boehringer Ingelheim). Also, Boehringer Ingelheim does not have to pay the 'discount' if the insured person does not claim reimbursement from the insurance fund.[546] To me, this indicates that these refunds by Boehringer Ingelheim are connected with 'the amount paid by the final consumer', because Boehringer Ingelheim only has to pay the insurance fund if the final consumer 'claims his cashback' (by claiming compensation from the insurance fund). Economically, the result of this case and the Elida Gibbs case are the same, and therefore, the rules as laid down by the CJEU in Elida Gibbs should also apply to the Boehringer Ingelheim case.[547]

Because the payments made by the (in my first example) manufacturer are made for a supply further down the distribution chain, under the economic and commercial reality of the scheme these payments can be considered 'third party payments' that are part of the taxable amount for the supply made by the supplier (in my examples: the retailer) to the person benefiting the discount (in the 'money off' scheme) as well as a discount or rebate in the price payable by the person benefiting from the discount or rebate. As mentioned above, the 'third party payment' is clear in the 'money off' schemes, where the ultimate supplier of the good (the retailer) is paid by the purchaser as well as the manufacturer. In the 'cash back' schemes, the manufacturer basically grants the rebate retrospectively, making the funding of part of the consideration invisible to the recipient of the consideration (i.e. the retailer).[548] The 'third party' (manufacturer) does not actually/directly pay the supplier (the retailer).

Based on the above, the consideration received by the ultimate supplier (e.g. the retailer) for his supply to the final consumer should always be the undiscounted price, i.e. the price including the amount paid by the manufacturer. The supplier (the retailer) will either receive this full price from the final consumer, who will subsequently receive (part of) it back from the manufacturer under the cash-back schemes, or partly from the final consumer and partly from the manufacturer (often as reimbursement for redeeming a voucher that entitles the holder, i.e. the final consumer, to a discount) as third-party payment. This taxable amount is not affected by the discounts or rebates granted under either scheme.

A relevant characteristic of the discount payments in the 'money off' schemes (as well as in the 'cash back' schemes) is that, even though they are made to the (ultimate) suppliers (e.g. the retailers), they are aimed at discounting the (gross) price paid by the final consumer of the product. In the view of the final consumer, it does not matter

546 Opinion of Advocate General Tanchev in case C-462/16, Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG, ECLI:EU:C:2017:534, paragraph 17.

547 For a different view leading to the same result, see J. Sanders, The VAT Impact of Discounts to Parties outside the Traditional Distribution Chain, 27 Intl. VAT Monitor 4, p. 254-257 (2016), Journals IBFD.

548 In the Elida Gibbs case, the UK tax authorities (the Commissioners) only considered the payment by the manufacturer in the 'money off' cases to be third party payments; CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 14.

whether the price for the product supplied to him by the ultimate supplier is reduced because of a payment made directly by the manufacturer to the ultimate supplier (i.e. a 'money off' transaction) or by a discount payment made directly to himself by the manufacturer (i.e. a 'cash back' transaction): he pays the discounted amount either way. To him, the payment represents a true 'discount' or 'rebate'. This, to the final customer, is 'economic reality'.

This can also be said for the business granting this 'discount' or 'rebate': even if the payment is a 'third party payment' to the ultimate supplier, the aim of the payment is to reduce (discount) the price paid by the final consumer.[549] The CJEU confirms this view by acknowledging that "although the manufacturer may in fact be regarded as a third party as regards the transaction between the retailer (...) and the final consumer, (...) [the] reimbursement entails a corresponding reduction in the amount finally received as consideration for the supply by him".[550] That's why it is not surprising that the business granting the discount or rebate wishes to apply the provision in the EU VAT Directive that allows him to lower his taxable amount by the amount paid as a discount or rebate. And that's why it is also not surprising that the CJEU agreed. But are they really discounts or rebates?

One scholar sees the 'cash back' payments by manufacturer to a retailer, in a distribution chain from a manufacturer to a wholesaler to a retailer and then to a customer, as a reduction of the price originally paid by the retailer.

5.4.6 Other rebates granted by another person than the party making the (direct) supply

It is also possible that a business grants a customer of a certain product a rebate off a supply he has not made himself, because that business will also benefit from an increase in the sales of the other business's products. An example could be a manufacturer of a specific type of coffee pads that can only be used in coffee machines manufactured and sold by another business. It is possible, but not necessary, that these businesses have agreed to some form of cooperation in marketing their products jointly.

In these types of scenarios, one party may offer the purchaser of a certain product that it purchased from another party (or that was manufactured by another party) a rebate (often in the form of money off or cash back). This rebate could be considered a

549 From CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 20, it is clear that the German tax authorities considered the direct payment of the money to the final consumer under the 'cash back' schemes as 'real' discounts that should reduce the taxable amount regarding the supply by the manufacturer. However, they did not wish to apply this VAT consequence to the 'money off' schemes, as they considered the payments under that scheme to be 'third party payments' and not 'discounts'.

550 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 45.

business expense, or costs incurred for performing a promotional activity, because the aim of funding the other party's product is increasing one's own turnover of products that may depend on the use of the other party's product, as in the above example.

Under the current EU VAT rules, these payments should be considered third-party payments. In my view, it would be difficult to argue that these payments constitute discounts since there was never a supply of the product that is now partially funded through the payment. In other words, there is not even a leapfrog. These scenarios are better comparable to the case ruled by the CJEU about the travel agent that offered travellers a discount to a travel that they booked directly with (and paid for directly to) a tour operator.[551] These payments do not lower the taxable amount for the supplies made by the business funding the discounts, and they have no other effect on the VAT position of these businesses either.

5.5 Analysis of the principles underlying the 'leapfrog rebates': are they really discounts/rebates?

In my view, the specific cases where 'leapfrog discounts/rebates' are granted require a specific VAT treatment. The fact that a manufacturer is actually funding the purchase by the consumer of its own product as sold by the retailer, should be used as the basis of the VAT treatment of these scenario's. In my view, the most relevant issue, addressed by the CJEU in the relevant cases, is that the manufacturer incurs costs that I think should be considered business costs and that should lead to a lower total amount of tax payable by it. This is something that the current provisions of the EU VAT Directive allow, but not through lowering the taxable amount. However, lowering the amount of tax payable is based on the 'economic and commercial reality' of the situations, because businesses incurring costs in relation to their business activities should be able to deduct the VAT incurred on those costs. In my view, the CJEU applied the same 'economic and commercial reality' to lower the amount of VAT payable, but through lowering the taxable amount. I will elaborate on this in Section 5.4.5.

Despite its name, VAT is not generally intended to be a tax on value added as such. Rather, it is usually intended as a tax on consumption, or rather on expenditure for consumption.[552] From an economic perspective, four basic forms of VAT exist,[553] two of which are relevant for this section: the 'subtractive-direct method' and the 'subtractive-indirect method'.[554]

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551 C-300/12, Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH, ECLI:EU:C:2014:8.

552 See, for example, Liam Ebril [et al.], The Modern VAT, First edition (Washington D.C., International Monetary Fund, 2001), 1 and Cnossen, A Primer on VAT as Perceived by Lawyers, Economists and Accountants, in Michael Lang [et al., editors], Value Added Tax and Direct Taxation: similarities and differences (Amsterdam, International Bureau of Fiscal Documentation, 2009), p. 125. See also Art. 2(1) of the EU VAT Directive.

553 Alan Tait, Value-Added Tax: Practice and Problems, Fourth Edition (Washington D.C., International Monetary Fund, 2001), 4.

554 See footnote 553.

Under the 'subtractive-direct method', which is a method based on accounts and sometimes referred to as a business transfer tax, tax is levied on the business' output minus its input.[555] Under this 'subtractive-indirect method', the tax paid on the business' input is (immediately) deducted from the tax due on its output. There are a number of reasons, which I will not discuss in detail, that explain why most of the countries that have implemented a VAT, have chosen to base it on the 'subtractive-indirect method'.[556] The most relevant reason is the fact that this method attaches the tax liability to the transactions.[557] This method ensures, for example, that goods (and services) can leave a jurisdiction free of tax, to be taxed at the place of consumption. The 'subtractive-indirect method', or 'invoice method', also creates a good audit trail.

In theory, from an economic perspective, there should be no difference in result (in the sense of amount of tax levied) between a value added tax in the form of the 'subtractive-direct method' and one in the form of the 'subtractive-indirect method'.[558] This means that under both systems, the manufacturer paying VAT on its total output minus its total cost should pay the same amount of VAT as the manufacturer that deducts all input VAT paid on its input from the VAT due on its total output. Therefore, whether the 'rebate' paid by the manufacturer is a cost (an input) or an adjustment of the output should not make a difference: the total VAT amount payable should be reduced as a result of this payment. It just does not fit into the (more or less) harmonised legalisation of the turnover taxes that is the EU VAT Directive.[559]

The CJEU achieves its goal of lowering the amount of VAT due by the manufacturer by allowing the business that funds the rebate or discount to reduce the taxable amount for his supplies by the amount of the discount or rebate granted. As mentioned above, the CJEU confirms this method in a number of consecutive rulings. The European Commission agrees with the CJEU that these discounts and rebates should affect the VAT position of the initial supplier, but the Commission does not agree on the method applied by the CJEU. The Commission suggests implementing specific provisions in the

555 Alan Tait, Value-Added Tax: Practice and Problems, Fourth Edition (Washington D.C., International Monetary Fund, 2001), 4.

556 For people that are interested, I refer to the books by Ebril and by Tait as mentioned in the above footnotes, as well as the studies that formed the basis for the current EU VAT system: The EEC Reports on Tax Harmonization: The Report of The Fiscal and Financial Committee and The Reports of the Sub-Groups A, B and C, Second Edition (Amsterdam, International Bureau of Fiscal Documentation, 1969).

557 Alan Tait, Value-Added Tax: Practice and Problems, Fourth Edition (Washington D.C., International Monetary Fund, 2001), 5.

558 See Cnossen, A Primer on VAT as Perceived by Lawyers, Economists and Accountants, in Michael Lang [et al., editors], Value Added Tax and Direct Taxation: similarities and differences (Amsterdam, International Bureau of Fiscal Documentation, 2009), p. 127-128.

559 As envisaged in Art. 93 of the Treaty Establishing the European Community, consolidated version, OJ C 315/1 of 24 December 2002.

EU VAT Directive to achieve the VAT consequences intended by the CJEU in its relevant jurisprudence,[560] which I will elaborate on below in Section 5.7.

Even though I am of the view that the VAT position of the initial supplier should be adjusted, as a result of the rebate or discount, I disagree with the methods applied by the CJEU as well as the ones suggested by the Commission for achieving this adjustment of the VAT paid on the original supply, as I will explain later in this Section.

In its relevant case law, the CJEU holds that the manufacturer of a product can reduce the taxable amount for the supply of that product if he grants a rebate or discount on the supply of that product to a consumer further down the distribution chain. The CJEU applies two principles as a basis for these ruling:

First, the CJEU takes into account the basic principle of the VAT system that it is intended to tax only the final consumer. Consequently, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer, which is the basis for calculating the VAT ultimately borne by him.[561] In my view, this is not a basic principle of VAT at all, as I will explain below. And even if it were a basic principle of VAT, I consider it irrelevant in deciding whether the VAT position of a business is affected if it funds part of the supply of its product by another supplier to a purchaser further down the distribution chain.

This is connected to the second principle used by the CJEU to substantiate its view that the supplier that funds the discount or rebate should reduce its taxable amount for the supply of the goods: the principle of neutrality. The CJEU expresses this as follows: “It would not therefore be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, to exceed the sum finally received by him. Were that the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the manufacturer is one, would not be complied with.”[562]

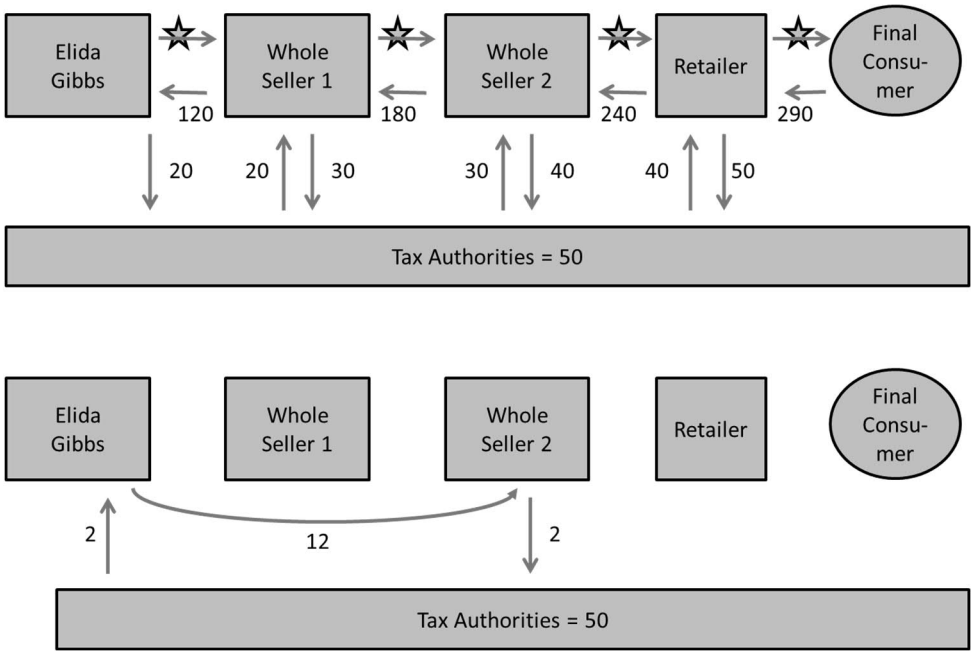
The CJEU seems to be of the view that the business that, in these cases, funds the discounts and rebates, finally receives less for its supplies. This would still be the case if the business would grant the discount or rebate to an entity in the distribution chain that is not the final consumer in that chain: it would still finally receive a lower total consideration whereas this would not affect the consideration actually paid by the final

560 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, p. 3.

561 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 19 and CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 29.

562 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 28. The CJEU repeats this in case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 30.

consumer would not be affected. I have shown this in the below diagram, where Elida Gibbs grants Wholesaler 2 a rebate. This rebate affects the total amount received by Elida Gibbs, but the price actually paid by the final consumer is not affected.[563] This 'leapfrog rebate' is still a rebate, and because of the price reduction within the chain it is possible that the end consumer pays less in the end, but that should be irrelevant for allowing the business funding the discount to lower his taxable amount. In the below diagram, all prices paid between businesses and also by the end consumer are VAT inclusive amounts.



In my view, from the above it is clear that the VAT position of the business granting the discount or rebate does not rely on the principle that the amount serving as the basis for the VAT to be collected cannot exceed the consideration actually paid by the final consumer. The issue is not VAT related at all. Businesses further down the chain that, for example, enter a new market also often charge considerations for products that are below their purchase price. In those cases, the final customer may also pay less than the amount received by businesses at the beginning of the production and distribution chain. This does not mean that these businesses should lower their taxable amount because the final customer paid less than they have.

This leaves the principle of neutrality, in the sense that the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, cannot exceed

563 The CJEU also uses an example where the 'final consumer' is a trader that is authorised to deduct input VAT, see CJEU case C-427/98, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2002:581, par. 66.

the sum finally received by him, as the basis for the CJEU allowing the manufacturer to reduce his taxable amount.

In the Commission v Germany case, the CJEU explains that in these specific cases, "the reason why the manufacturer (…) is authorised (…) to reduce his taxable amount is that the price paid by the final consumer includes VAT, and accordingly any reduction in that price likewise includes a VAT element".[564] The CJEU then explains that "(…) where, owing to an exemption [as a result of a cross-border supply of the goods, JB], the (…) [amount of the discount or rebate, JB] is not chargeable to tax in the Member State from which the goods are despatched, no price invoiced at that stage of the distribution chain, or at a later stage, includes VAT, which means that a reduction or a partial reduction of that price cannot in turn include a VAT element capable of giving rise to a reduction of the tax paid by the manufacturer".[565]

Here, the CJEU basically says that the 'principle' that VAT is only due on the amount actually received in these cases, does not apply in all cases. I find it hard to accept that a 'principle of VAT' only applies to certain transactions or in certain cases. I therefore propose that the CJEU, although trying to achieve a goal that serves a valid economic purpose, has chosen the wrong way of solving this particular VAT puzzle.

I think that the CJEU focused too much on the 'familiar mechanics' of decreasing of the price paid by the final consumer that is caused by the payment made by the manufacturer. From an economic perspective, the fact that less money is made on the sale of a good because the final price was reduced is the same as granting a discount or rebate. And that is how the CJEU treated the payments by the manufacturer. It seems that because the (mechanics of the) EU VAT rules allow for decrease of the taxable amount for the original supply of the good in case of rebates or discounts after the supply has taken place, this decrease was also granted to the manufacturers in the two cases I discussed above. However, in my view, there is a better way of solving this VAT puzzle. The focus should have not been on the decrease of the price of the product, but on the actual payment made by the manufacturer. I will elaborate on this below, but before I do, I will further elaborate on why in my view, the path chosen by the CJEU to find the correct way out of this VAT maze is not the best route.

5.5.1 The CJEU entangled in a VAT web?

The EU VAT system is based on the taxation of specific transactions between parties that have agreed on a supply for a consideration.[566] Under the relevant provision of the EU VAT system, where the price is reduced after the supply takes place, the

564 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 64.

565 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2002:581, par. 64.

566 See above in Section 5.4.

taxable amount shall be reduced accordingly.[567] In these provisions, reference is made to 'the price' and 'the supply'. These clear provisions can and should, in my view, only be interpreted as meaning that where payments are made or received outside the well-defined relationship between the supplier and its direct customer, i.e. the parties to a legal agreement defining a transaction and the consideration for that transaction, these payments do not affect the original taxable amount or the original basis for input VAT deduction.[568] The Advocate General in the Elida Gibbs case is of the same view, and recommends the CJEU to rule that the payments made by Elida Gibbs for redemption of the vouchers in both schemes (i.e. the cash back as well as the money off scheme) cannot lead to a reduction of the tax base at Elida Gibbs.[569]

In its ruling in the Elida Gibbs case, the CJEU starts off by briefly describing what it calls some basic principles of the VAT system and how it operates.[570] As mentioned above, one of these 'basic principles' is the following: "the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him".[571]

As I mentioned above, in my view, this is not a basic principle of the EU VAT system, or at least not based on the legal system embodied in the EU VAT Directive. The taxable amount is not defined as "the amount paid by the final consumer" but "the amount obtained or to be obtained by the supplier".[572] The reason for that is that the EU VAT is levied on the total expenditure for private consumption. This is substantiated by the fact that under the relevant provision in the EU VAT Directive, the taxable amount for the supply of goods and services includes payments received from a third party (not being the customer) and certain specific subsidies.[573] Another reason to doubt this 'basic principle' is the fact that the CJEU has ruled on other occasions that the final consumer does not even have to be aware of the actual price of the goods or services it acquired.[574] However, in the Elida Gibbs case (and its subsequent rulings) the CJEU relies on the aforementioned basic principle.[575] In the Elida Gibbs case, it held that the payments made in these specific schemes should reduce the taxable amount on which VAT was paid, allowing Elida Gibbs the refund it applied for.

567 Art. 90(1) EU VAT Directive.

568 For the latter, see Art. 185(1) of the EU VAT Directive.

569 Opinion of A-G Fennelly in case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:255.

570 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 18.

571 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 19.

572 Art. 73 of the EU VAT Directive.

573 Art. 73 of the EU VAT Directive.

574 CJEU case C-288/94, Argos Distributors Limited and Commissioners of Customs and Excise, ECLI:EU:C:1996:398, paragraph 21 and CJEU case C-172/96, The Commissioners of Customs and Excise and First National Bank of Chicago, ECLI:EU:C:1998:354, paragraph 49.

575 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400, par. 31.

In my view, the relevant provisions in the EU VAT Directive are sufficiently clear not to allow the interpretation given to it by the CJEU, even if the CJEU wished to rely on a basic principle that could not be applied within the framework of these legal provisions. This is based on the principle of legal certainty that prescribes that when a text is evident it should be applied literally.[576] Even though I will not go as far as some by saying that the CJEU's decisions are based on sloppy argumentation and legal principles of its own invention,[577] I disagree with its ruling in this case (even though I accept that in some specific cases, funding a discount or rebate on the supply of one's own product further down the distribution chain should affect a business' overall VAT position, as I mentioned above). So did the German government,[578] who refused to adapt its local VAT rules to (part of) the outcome of the case.[579] As a result, Germany was taken to court (the CJEU) by the European Commission in an attempt to force Germany to comply with the outcome of the Elida Gibbs case. The Advocate General to the CJEU considered this case as a reopening of the issues in Elida Gibbs.[580] Surprisingly (to me, at least), both the Advocate General and the CJEU insisted in this case that these kinds of payments (i.e. the payments made by the manufacturer to the retailer or the final customer) should reduce the taxable amount of the business paying them,[581] even though the CJEU in that same case considers these payments as 'third party payments'.[582]

Even though I do not agree with the rulings, because in my view they are not compatible with the legal system as laid down in the EU VAT Directive, I do understand why the CJEU wanted to use this method for reaching this outcome and, as mentioned above, I also think that under the specific circumstances of these cases, the relevant payments should affect the VAT position of the business making them, but not in the way the CJEU deems appropriate. Economic reality, in my view, requires that the relevant payments are taken into account from a VAT perspective. Before I explain what I consider to be the correct VAT treatment of these specific discounts and

576 See, in the same sense, Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, First edition, Volume 1 (Amsterdam, International Bureau of Fiscal Documentation, 2018), p. 267.

577 Roman Herzog and Lüder Gerken, "Stop the European Court of Justice" in EUObeserver.com (an online-only publication) of 10 September 2008: "(…) the CJEU deliberately and systematically ignores fundamental principles of the Western interpretation of law, (…) its decisions are based on sloppy argumentation, (…) it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgments." http://euobserver.com/7/26714

578 Nor, apparently, the UK government, who supported the German government in this case, even though the UK had adapted its VAT legislation to the CJEU's ruling in the Elida Gibbs case.

579 Germany had, in fact, accepted that the taxable amount of the manufacturer should be lowered in case of 'cash back schemes' but not in case of 'money off schemes', because in the latter schemes the payment by the manufacturer was considered a 'third party payment' by the German authorities.

580 Opinion of A-G Jacobs of 20 September 2001 in case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:90, paragraph 28.

581 Opinion of A-G Jacobs of 20 September 2001 in case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:90 and CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581.

582 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 45.

rebates, I first investigate the practical problems that are the result from the CJEU's case law on 'leapfrog discounts', as well as some alternative methods of dealing with the relevant issues.

5.6 Practical analysis of the rulings; practice and (perceived) problems

In this subsection I analyse the effects of the CJEU's rulings and the (perceived) problems created by them, by addressing the specific elements in a chain of transactions that are affected by these rulings. I have included a description of the local rules from two EU Member States with regard to the application of these rulings, to see how these issues are dealt with practically at a local level within the EU.

First, the rulings affect the taxable amount for the supplies made by the business granting the 'discounts' or 'rebates' under the 'money off scheme' and the 'cash back scheme'. As a result of the rulings, this taxable amount is reduced by the amount paid under either scheme (by an amount of 4 in the below examples).[583]

Second, none of the transactions in a chain that exist between the entity receiving and the entity paying 'discounts' or 'rebates', are affected by the schemes.[584]

Third, as part of the second point but only applicable to the 'money off scheme', the retailer's taxable amount to the final consumer is the full retail price, namely the price paid by the final consumer plus the amount reimbursed to the retailer by the manufacturer (an amount of 200 in the below examples).585

Last, where the final consumer is a taxable business that is entitled to deduct VAT and that uses the goods for its business, according to the CJEU the deduction should be based on the amount charged by/paid to the retailer less the reimbursed amount because, effectively, the CJEU is of the view that this final consumer is granted a discount, which is a 'price reduction' obtained by that consumer (the 'final' deducted VAT amount is 36 in both examples below).[586,587] This would be different if the payment made by the manufacturer would only be considered a 'third party payment' and not (also) a discount. I will elaborate on this below.

583 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 46 and par. 59.

584 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 27.

585 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 59.

586 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 66.

587 If the price reduction is obtained after the original supply, the adjustment of the initial VAT deduction is based on Art. 185 of the EU VAT Directive.

The above can be illustrated in a diagram (in which, unlike in the prior examples, the final consumer (C) is a fully taxable business that uses the goods for its taxed business purposes) as follows:

Diagram 7 – "money off scheme"

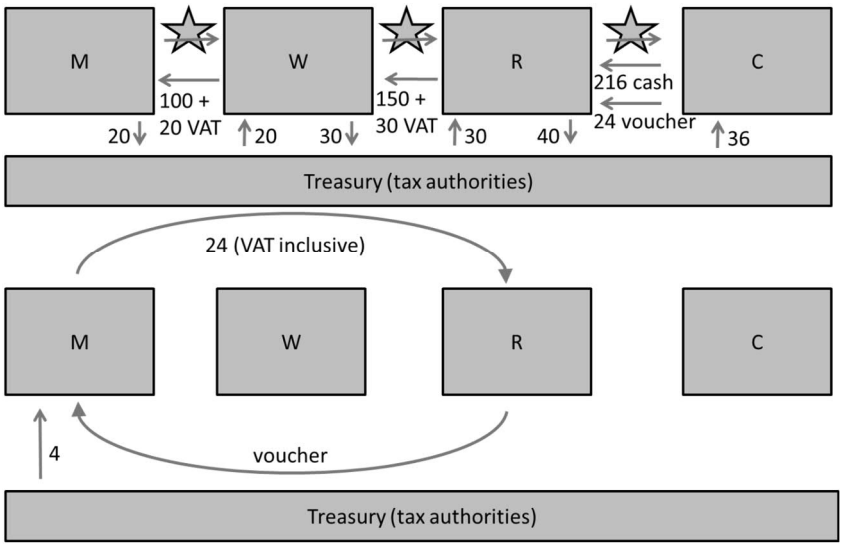
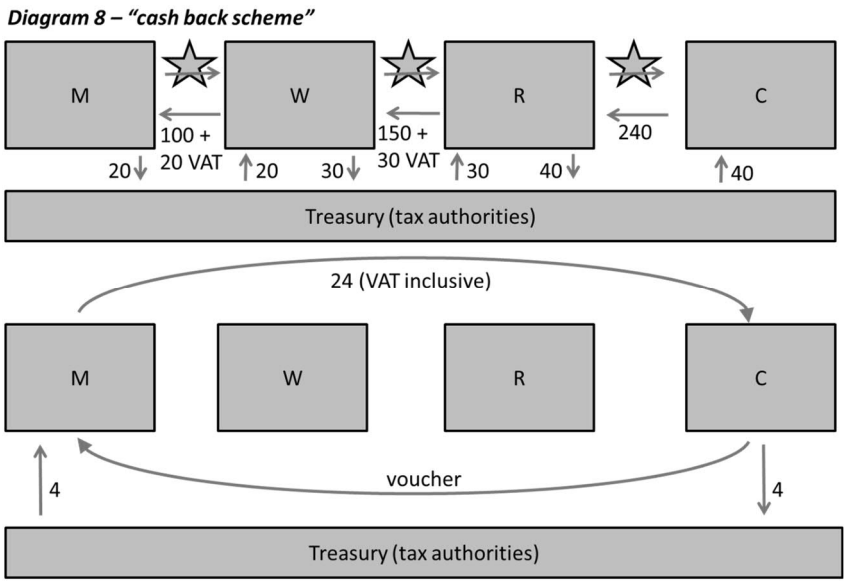


Diagram 8 – "cash back scheme"



At first sight, the adjustment of C's initial VAT deduction in Diagram C may appear strange, because R made a supply to C of 240 (200 + 40 VAT) and R does not grant C a subsequent rebate, nor does he issue a credit invoice for part of the sales price.

However, as mentioned above, in the Commission v. Germany case[588], the CJEU held that "(…) where the final consumer is a trader authorised to make deductions who uses the goods in his business, any over-deduction resulting from subsequent reimbursement of a voucher may be avoided by adjusting the deduction of input tax effected in respect of that final consumer in accordance with Article 20(1)(b) of the Sixth Directive (Art. 185(1) of the EU VAT Directive, JB), which provides for the adjustment of deductions made initially in the case of a change in the matters taken into account in determining the amount of deductions occurring after the declaration has been made. Compliance with the duty to adjust deductions may be ensured in that case as well by accounting checks in respect of both the final consumer and the manufacturer".

I will not repeat the principal problem I have with these rulings but focus on the particular issues one by one. I will first focus on issues relating to an entirely domestic chain of transactions. After that I will analyse issues related to cross-border transactions.

5.6.1 Practical issues arising in a domestic chain of transactions

In this subsection, I will assume that the final customer is not a business that can deduct VAT unless explicitly stated otherwise.

Under the relevant CJEU rulings, the taxable amount for the sale by the manufacturer (M) is reduced by the amount paid by it as a rebate, under either scheme (as a 'cash back' to the final consumer and also as 'money off' to/via the retailer). This is what the CJEU literally rules: "(…) the taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded (…)".[589]

For money-off schemes, the issue that arises from this rule is that the amount of the rebate is in fact a VAT inclusive value (because it is used to pay for the VAT inclusive price).[590] This is clear from the fact that the VAT position of the retailer (R) is not affected in the money off scheme: VAT is remitted on the full net value of the transaction, and the full VAT inclusive price is paid for in cash and the value of the rebate received from M. This means that the adjustment of the taxable amount for M's supply should not be made to the amount value of the paid discount, but to that amount less the applicable VAT that's included in it. Otherwise the tax authorities would lose money on this transaction – unless any adjustment made of a deduction at the consumer's (C's) side is made to the same (incorrect) amount. Even if the latter would be the case, this does not mean that incorrect rules should be applied just because they do not cost the tax authorities any money. Although one can easily argue

588 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 66.

589 CJEU case C-317/94, Elida Gibbs Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1996:400.

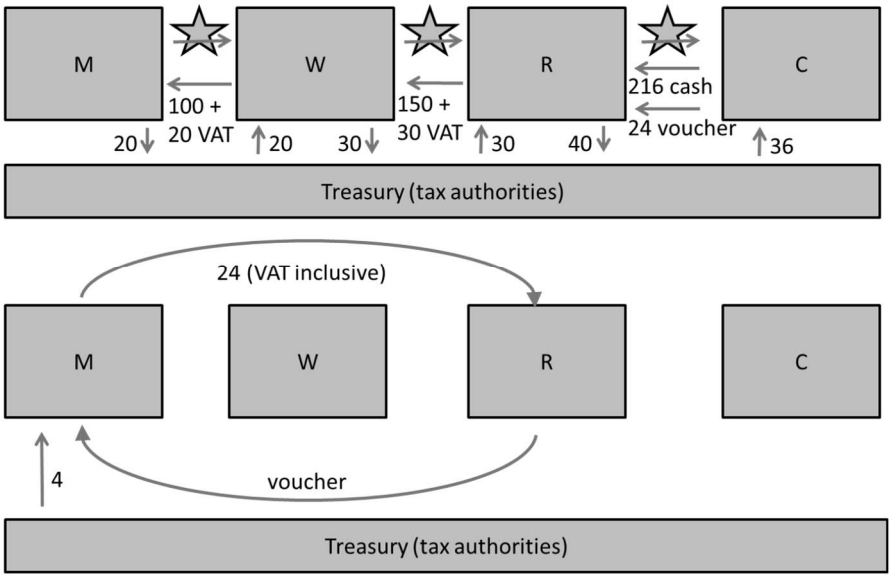
590 See also CJEU case c-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 64.

that it is obvious that the CJEU means that the taxable amount should be lowered by the net part of the (gross) refunded amount, that is not what the CJEU says in its ruling, which in itself is clearly worded. And this can lead to even more issues, as I will demonstrate below.

Even though the CJEU may have not exactly meant what it ruled, this issue, which I will refer to as 'gross-net-issue', is in my view a relevant practical issue that arises from the relevant CJEU rulings with regard to domestic chains of transactions (besides the fact that, in my view, the principles underlying the rulings are irrelevant for those rulings or incorrect, as mentioned above). I will now have to point out that the amounts I used in my examples in *Diagram 7* and *Diagram 8*, more specifically the 24 voucher and redemption value and the 4 VAT adjustment value (at the manufacturer and the consumer level) are incompatible with the literal text of the CJEU's rulings as a result of this 'gross-net-issue'.

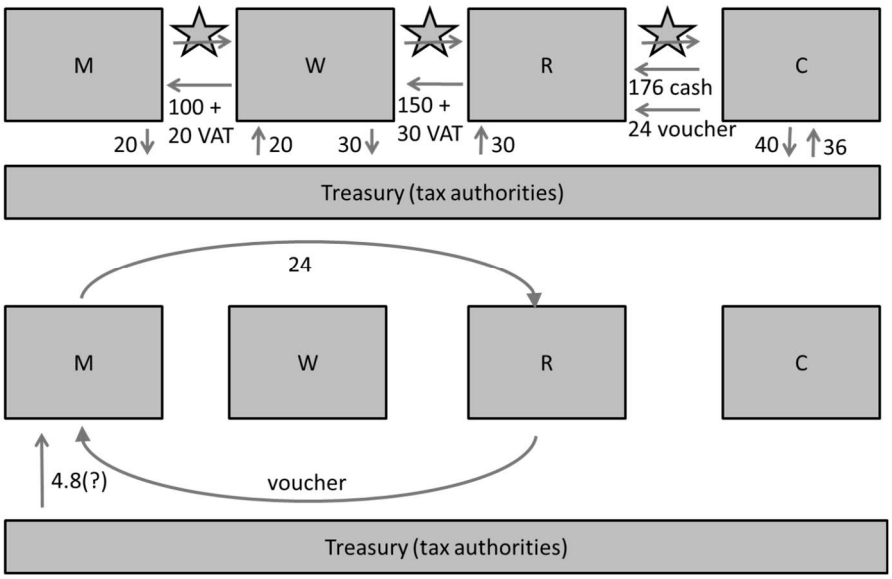
Another issue regarding the 'status' of the refunded amount is, in my view, caused by the fact that the 'gross-net-issue' does not occur in a domestic chain where the reverse charge applies to the transaction for which the rebate is funded by the manufacturer. In this scenario, C qualifies as a taxable person with the right to fully deduct VAT. In that case, the payment is made by the manufacturer for funding/discounting a net amount, because that is what the supplier (R) charges his customer (because the customer is liable for the VAT due). This means that in this case the manufacturer makes 'third party payment' (at least in the eyes of the retailer) that effectively is a net amount, which means that this amount is indeed the amount by which the taxable amount of the retailer should be decreased (under the Elida Gibbs mechanism). This can be shown in two diagrams as follows:

Diagram 9a – local "money off scheme" without reverse charge



And

Diagram 9b – local "money off scheme" with reverse charge



The 'gross-net-issue' also does not apply to exempt cross-border transactions, as I will demonstrate below.[591,592]

Another practical issue that may arise in cases where, in my example, M is unable to exactly allocate payments with regard to money off or cash back schemes to specific sales of products. If a cash back voucher is printed on the box of a product and has its own unique serial number, M should be able to link the payment made to the person redeeming the voucher to a specific supply made earlier to the wholesaler. Under the relevant CJEU case law, the taxable amount for this earlier supply should then be reduced. However, if M decides, for example, to distribute free money off vouchers by including them in local papers, were these money off vouchers can be used as payment (or: for obtaining a discount) for M's products at designated retailers, and where M

591 In my view, this 'gross-net-issue' may have been the reason why Germany had accepted to apply the Elida Gibbs ruling to 'cash back-schemes', where it is more obvious that the payment is made purely to reduce the amount paid by the end customer, and not to 'money off-schemes', where Germany considered the payments to be 'third party payments' for the supply by the retailer.

592 An (im)practical result of this 'gross-net-gross-issue' is that in cases where a face-value voucher is used, the net value of the supply made by the entity making the supply should reflect the VAT inclusive end result that it intends to achieve. In a local supply chain where the 'discounted' transaction is subject to the reverse charge mechanism, the net price of a supply where the actual direct supplier grants the 'face value' discount should be slightly higher than the value of the same supply when the 'discount' is funded by a business earlier in the supply chain. When I discussed the 'gross-net-issue' with a VAT manager in a company that applies these voucher discount systems a lot, he informed me that his company adjusts the net prices according to the nature of the discounted supply, so that the amounts on the vouchers are correct (i.e. the situation is adjusted to the value printed on the voucher).

produces and sells goods that are subject to different VAT rates, it may be difficult to link the (payments for the redemption of the) vouchers to specific earlier sales, which would make it hard to determine which tax base to reduce – the one used as a basis for calculating the VAT due under the normal VAT rate or under the lower VAT rate. This issue of course does not occur where the purchaser of the good has to identify the good purchased, e.g. by sending a copy of the receipt, which should also include the applicable VAT rate.

Before elaborating on some of the practical issues that arise in cross-border application of the CJEU case law, I will first describe how some EU Member States have tried to solve the particular piece of the VAT puzzle that I described above.

5.6.2 The Dutch rules and solutions

In the Netherlands, a specific Decree allows the manufacturer (in the above example) in both the 'money off scheme' and the 'cash back scheme' situations to reduce his taxable amount by the full amount paid in respect of a cash back or money off scheme.[593] The 'gross-net-issue' is not addressed or solved in this Decree.

5.6.3 The UK rules and solutions

In the UK, the VAT consequences of each scheme are set out in a notice.[594] Under the 'money off scheme', manufacturers can reduce their taxable amount by the full amount that is actually refunded. Under the 'cash back scheme', the manufacturers can reduce their taxable amount (by the full amount of the refund) as well, provided the manufacturer has charged and accounted for UK VAT on the original supply to the wholesaler or retailer.

The rules in the notice that apply to the 'cash back scheme' also provide for a rule under which VAT registered traders receiving a 'cash back' have to reduce the taxable value of their purchase and they must reduce their input tax accordingly. Strangely enough, this rule is not included for 'money off' schemes. This is also the case for cross-border (re)payments: they are covered in the notice in case of cash-backs (no adjustment in case the recipient is in another Member State (it does not say anything about recipients outside the EU)) but not for money off schemes.

The notice addresses the issue regarding allocation of the payments/reductions to turnovers that are taxed at different rates (albeit only the zero rate or exemption with credit versus the other rates) but does not specify how this should be done in

593 Based on Art. 29 of the Dutch VAT Act and a Decree from the Ministry of Finance of 14 December 2018, No. BLKB 2018-217731, "Heffing van omzetbelasting ter zake van vouchers, waardebonnen en zegels", Stcrt. 2018, nr. 68657 (on line source: https://zoek.officielebekendmakingen.nl/stcrt-2018-68657.pdf).

594 Notice 700/7, Business promotion schemes, 28 May 2012, paragraphs 9 (Cash backs) and 12.2 (Money-off coupons) (on line source: https://www.gov.uk/guidance/business-promotions-and-vat-notice-7007#manufacturers-consumer-promotions) (last accessed on 27 February 2019).

situations where allocation to specific transactions is not possible from a practical point of view.

The 'gross-net-issue' is touched upon in this notice from the perspective of the entity paying the refund (cross border funding does not lead to a decrease of the taxable amount) but not solved.

5.6.4 Cross-border chain of transactions

Things become more complicated, and distortive, when the chain of transactions crosses a border between two autonomous tax jurisdictions, even though the CJEU ruled that no adjustments to the taxable amount can be made in these situations, as I will elaborate on below.[595] In this section (Section 5.6.4) I will focus on cross-border transactions and their VAT treatment under the current EU rules. In Section 5.6.4.1 I will describe how the proposed VAT treatment of the cross-border supply of goods[596] may affect the VAT treatment of leap-frog price reductions.

For this subsection, it is relevant to keep in mind that the purpose of the EU VAT system is taxing local private consumption by levying tax on the expenditure made for that purpose,[597] which means that, where possible, taxation of such transactions should occur in the country of consumption.[598] In the below two diagrams, I will demonstrate why the application of the rules as set out by the CJEU in its relevant case law does not lead to the desired result in cross-border transaction chains. I will explain these diagrams and elaborate on the relevant issues that arise. In the two examples, I will focus on the 'money off schemes', but the issues equally apply to the 'cash back schemes'.

595 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 64.

596 Proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States, COM(2018) 329 final, Brussels, 25.5.2018, to be found on-line at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0329 (last accessed on 27 February 2019).

597 See Section 5.4.5.

598 See, for example, the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT, Towards a simpler, more robust and efficient VAT system tailored to the single market, COM(2011)851, Brussels, 6 December 2011, p. 5 (Section 4.1, "A EU VAT system based on the destination principle").

Diagram 10a – cross-border "money off scheme"

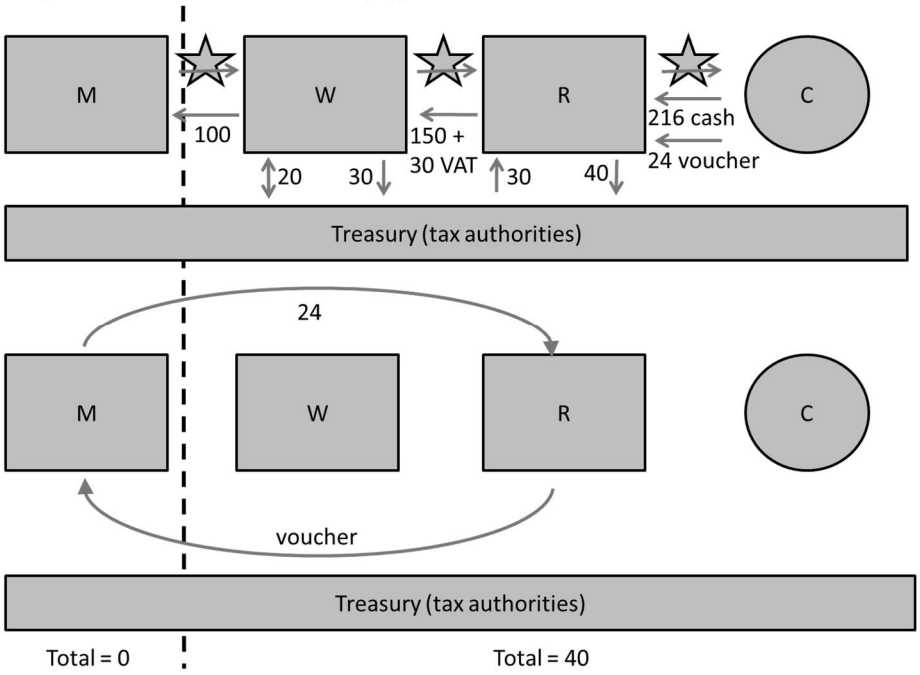
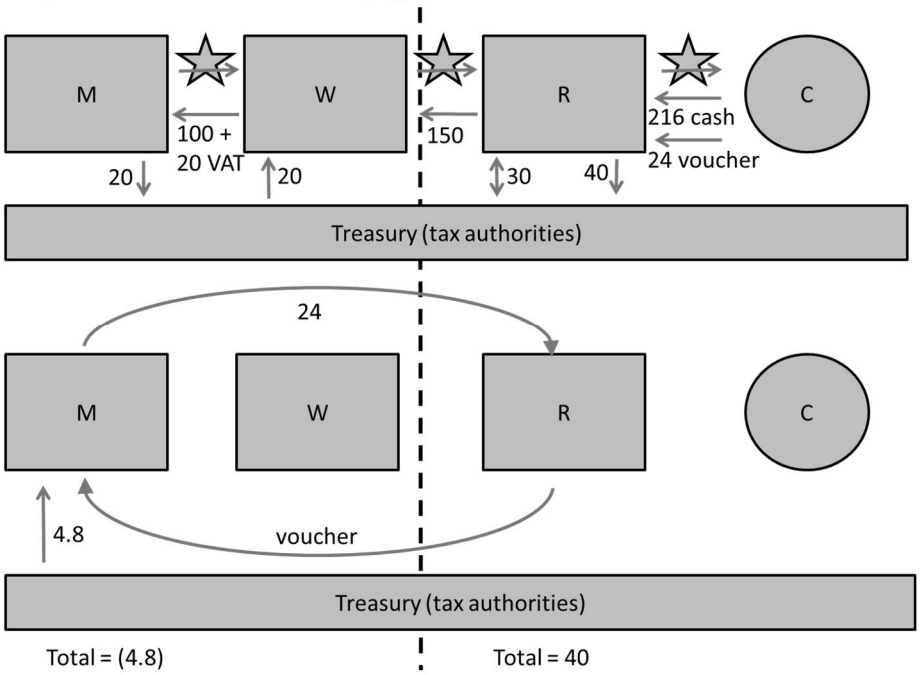


Diagram 10b – cross-border "money off scheme"



In these examples I have assumed that the applicable VAT rate in both countries is 20%. The double arrow represents an amount payable that is balanced against the same amount that is deductible.[599]

In the first example, shown in Diagram 10a, the exempt cross-border transaction is the supply by the first manufacturer (M) to the wholesaler (W). This means that M will not have to charge or remit any local VAT on this supply.[600] Under the relevant CJEU case law, M is not allowed to adjust the taxable amount for this supply by reducing it with the amount of the rebate paid to R, as held by the CJEU in the Commission v Germany case, because "(…) where, owing to an exemption, the value stated on the money-off coupon is not chargeable to tax in the Member State from which the goods are despatched, no price invoiced at that stage of the distribution chain, or at a later stage, includes VAT, which means that a reduction or a partial reduction of that price cannot in turn include a VAT element capable of giving rise to a reduction of the tax paid by the manufacturer(…)".[601] Under the specific UK rules discussed in subsection 5.6.3, the manufacturer would also not be allowed to adjust its taxable amount in the case of 'money off schemes'.[602] At a first glance, this seems irrelevant for the manufacturer's VAT position, because the transaction that would have been adjusted was not taxed anyway.

However, this is relevant for businesses that also perform VAT exempt supplies that do not allow (full) input VAT recovery. The deduction of VAT incurred by these businesses on costs that are not attributable to specific output transactions, also called 'general costs' or 'overhead costs', is based on the deductible proportion. As a general rule, the deductible proportion, or pro rata, is made up of a fraction comprising, as a numerator, the total amount, exclusive of VAT, of turnover per year attributable to transactions in respect of which VAT is deductible and as denominator, the total amount, exclusive of VAT, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which VAT is not deductible.[603] Determining the correct amount of turnover that is included in the denominator, and therefore determining the correct basis for the calculation of the deductible proportion of input VAT incurred on general costs, is affected by whether or not an adjustment to the taxable amount is

599 Under Art. 138 of the EU VAT Directive, the cross-border supply of goods within the EU is exempt with credit, which ensures that the goods leave the territory of supply free of tax. Under Art. 40, Art. 68, Art. 200 and Art. 168(c) of the EU VAT Directive, the purchaser of these goods will have to account for local VAT as payable on the purchase of these goods, which he can also account for as deductible in the same VAT return.

600 See art. 138 (for intra-Community supplies) or art. 146 (for export supplies). Even though the treatment is called an 'exemption', the supplier will often apply a local rate, albeit 0% (a zero-rated supply), to indicate that the place of supply and thus the applicable VAT rules are the rules of the country where the transport or dispatch of the goods starts.

601 CJEU case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 64.

602 Notice 700/7, Business promotion schemes, March 2002, paragraph 9.2 (on line source: http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_CL_000091) (last accessed on 10 November 2017).

603 Art. 173 and Art. 174 of the EU VAT Directive.

made. Therefore, in my view, if the adjustment of the taxable amount is the 'adjustment method of choice' (which it shouldn't be, as I demonstrate in this section), this adjustment should also be applied in cases where no tax was actually charged or remitted.

In the second example, shown in Diagram 10b, the transaction between the manufacturer (M) and the wholesaler (W) is a local, taxed transaction and the transaction between the wholesaler (W) and the retailer (R) is the cross-border transaction that is not taxed in the country of the supplier and taxed in the country of the retailer (R), who can offset this amount against the same amount of deductible input VAT.[604]

In this scenario, VAT is charged and remitted to the tax authorities by the retailer (R) on the full (VAT exclusive) transaction price (200), which is in line with the purpose of EU VAT as described above: the taxation of expenditure for local private consumption. Through the deduction system and the application of the 0% VAT rate to the cross-border supply, ultimately, all expenditure is taxed in the country where the final customer (C) is established.

However, as a result of the relevant CJEU rulings, the manufacturer (M) in the other country cannot deduct the face value of the vouchers from its taxable amount for the supply of the goods to the wholesaler (W). This means that, even though M finally receives a smaller amount for his supply than the amount on which he remitted VAT, he is not entitled to a partial refund. This goes directly against one of the two 'principles' that form the basis of these same CJEU rulings.

On the other hand, if M were to be allowed to reduce his taxable amount on the grounds that he finally received a lower consideration for his supply, M would (in the above example) be entitled to a refund of 4.8 (assuming his taxable base is reduced by the amount of 24). The result for the treasury in M's country would then be negative: the treasury of this country would have basically funded part of the consumption in another country (through partial funding of the 'third party payment' by M for the consumption in the other country). This effect would be even more obvious in case the two countries apply different VAT rates. In the most extreme situation under the current VAT rates in the EU, where (in January of 2019) Hungary applies a standard rate of 27% and Luxembourg a standard rate of 17%, the Hungarian treasury may have to fund 27% VAT for partial payment for consumption in a country where the actual consumption is taxed at 17%. This, to me, demonstrates that the ultimate answer to the question about the VAT consequences of these money-off and cash-back schemes does not lie in the lowering of the taxable amount of the business funding part of the purchase by the final consumer.

604 Art. 138, Art. 20, Art. 200 and Art. 168(c) of the EU VAT Directive.

5.6.4.1 Cross-border chain of transactions under the proposed (temporary) rules for intra-EU cross-border trade

In 2017, the European Commission presented its plans to modernise the current EU VAT system for the intra-EU cross-border trade of goods.[605] The proposed detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States were presented by the Commission in 2018.[606] Under these proposed rules, the intra-EU cross border supply of goods shall be deemed to take place in the Member State where the transportation of the goods ends (proposed Articles 33 and 35). For business-to-business transactions, there is an option to apply the reverse charge mechanism to the VAT due on those supplies, effectively shifting the VAT liability for the supply from the supplier to the customer, if the customer is a so-called 'Certified Taxable Person' (CTP).[607] CTP is a status that can be obtained by EU established businesses if they meet certain requirements that, basically, demonstrate that they are considered 'trustworthy taxpayers'.[608] Since it is not relevant for this research, I will not further elaborate on the proposed CTP concept. For intra-Union supplies[609] to CTPs, the VAT treatment of leap-frog rebates in cross-border situations as described above in Section 5.6.4 does not change. For the intra-Union supply of goods to non-CTPs, the supplier will have to charge VAT in the country where the transportation of the goods ends. If the supplier would grant a rebate under those rules, it would be even more relevant for him to be allowed to reduce the taxable amount for his original supply, as this taxable amount is the basis for him charging the local VAT of the country of destination, which should be partially refunded under the Elida Gibbs-rules, instead of 'only' adjusting a zero-rated supply.

5.6.5 Summary of all issues identified with regard to the CJEU's VAT treatment of 'leapfrog' discounts and rebates

Above, I have identified the following principle-based issues that arise from the application of the rules from the relevant CJEU rulings:

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605 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the follow-up to the Action Plan on VAT Towards a single EU VAT area - Time to act, COM(2017) 566 final, Brussels, 4.10.2017, accessbile on-line on https://ec.europa.eu/taxation_customs/sites/taxation/files/communication_-_towards_a_single_vat_area_en.pdf (last visited on 27 February 2019).

606 Proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States, COM(2018) 329 final, Brussels, 25.5.2018, accessible on line on https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0329 (last visited on 27 February 2019).

607 Under the proposed Articles 13a and 194a of the rules propsed in COM(2018) 329 final (see footnote 606).

608 See the Explanarory Notes to the proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States, COM(2018) 329 final, Brussels, 25.5.2018, accessible on line on https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0329 (last visited on 27 February 2019).

609 See the proposed Article 14(4)(3) of the rules propsed in COM(2018) 329 final (see footnote 606).

- The rules, although based on a principle that is correct from an economic point of view (i.e. based on economic reality), are incompatible with the relevant provisions in the EU VAT Directive as they stand;
- The 'principle' that dictates that the taxable amount that serves as a basis for the VAT levied by the tax authorities cannot be higher than the (net) amount actually paid by the final consumer, is both irrelevant for solving the VAT issues regarding cash-backs and money-offs, as well as incorrect;
- The 'principle' that dictates that the consideration 'finally received' by the business funding the cash-back or money-off should be decreased by the amount funded is, in my view, not really a 'principle of VAT' (either); and
- If only one of the two 'principles' is applied, there is the risk of funding by one government (treasury) of consumption in another tax jurisdiction.

I have also identified the following practical issues that arise from the application of the rules from the two CJEU rulings:

- It may prove hard to actually allocate the payment by the manufacturer for the redemption of a voucher to a specific output, for which the taxable amount should be decreased (in case more than one VAT rate applies to the outputs of the manufacturer);
- In some countries, like the UK, manufacturers are not allowed to adjust their taxable base in all cases, which may affect the pro rata calculation;[610]
- The 'gross-net-issue', created by the fact that 'leapfrog'-rebate or discount can be used as (partial) payment of the gross value of a transaction between a retailer and its customer, as well as serve as the basis for a deduction of the taxable amount, which is by definition a net amount, by the manufacturer; and
- The 'gross-net-issue', created by the fact that the payment by the manufacturer can be made to partially pay for a net price charged by the retailer (in case of a transaction subject to the reverse charge mechanism or an intra-Community supply of goods) but meant to fund the total VAT inclusive price paid by the final customer.

It should be clear from the above that there should be a better way of dealing with 'leapfrog' cash backs and money off schemes from a VAT perspective. Before I describe what I consider to be the best way of dealing with these schemes, I will first elaborate on some ideas from the European Commission to tackle (some of) the issues regarding the VAT treatment of cash backs and money off schemes.

610 This is also explicitly ruled by the CJEU in case C-427/98, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2009:581, par. 64.

5.7 The Commission's original (or first) proposal for changes to the VAT Directive and why this proposal doesn't solve all the issues

On 10 May 2012, the European Commission published a proposal for a Council Directive, amending the EU VAT Directive, as regards the treatment of vouchers ('the original proposal').[611] The proposal, in an entirely different form, was adopted in 2016. This definitive adjustment to the EU VAT Directive does not contain rules about the VAT treatment of money-off and cash-back schemes, which were included in the original proposal. That's why I will discuss the original proposal, since it gives an insight into the Commission's ideas on how to tackle these issues.

In the Explanatory Memorandum to the original proposal, the Commission specifically remarks that with regard to the 'money off schemes' and the 'cash back schemes', the existing rules, as interpreted by the CJEU, are cumbersome and difficult to apply in practice and that a better approach is badly needed. The objective of the original proposal is "to deal with these issues by clarifying and harmonising the rules in EU legislation on the VAT treatment of vouchers".[612] The Commission also mentions the practical consequences of cross-border (voucher) transactions, which include double taxation and non-taxation.[613]

The first issue that the Commission addresses is the fact that, under the current rules in the EU VAT Directive, adjustment of a taxable amount only seems to apply to discounts granted between the same parties that were involved in the original supply. In order to achieve an adjustment of the manufacturer's VAT position, the Commission proposes to split up the supply that is partially paid for with the voucher (under the 'money off scheme') into two separate supplies: one by the retailer to the consumer and, by proposing a new provision that provides for the supply of a 'redemption service', one by the retailer to the manufacturer.[614] This creates a VAT relevant transaction between the retailer and the manufacturer, which can be used as the basis for lowering the total amount of tax payable by the manufacturer. This is not done by lowering its tax base (output adjustment), but by allowing the manufacturer to deduct the VAT due on the (new) redemption service supplied to it by the retailer (creating

611 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, on-line source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF

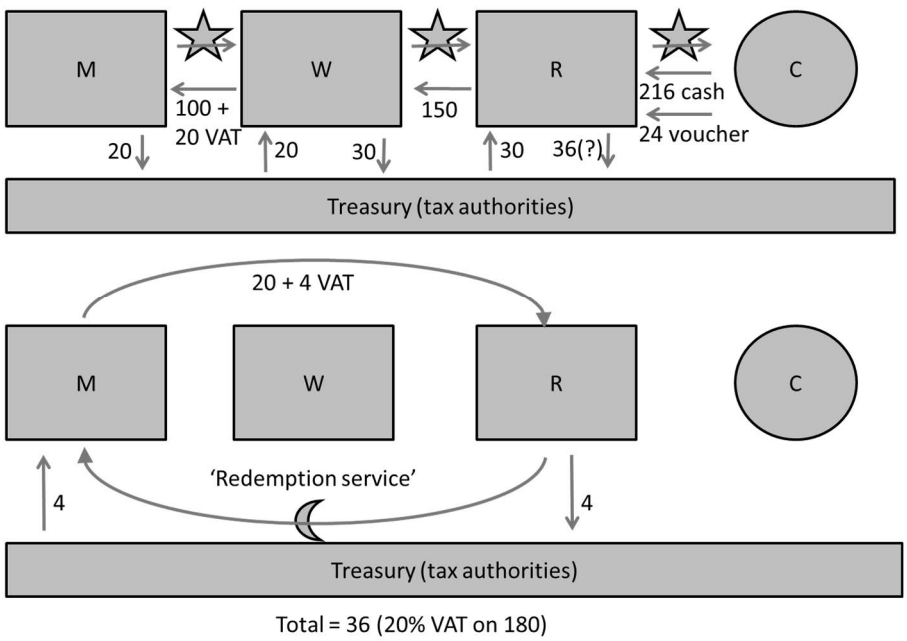
612 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, p. 2.

613 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, p. 3.

614 Proposed Art. 25(e): A supply of services may consist, inter alia, in one of the following transactions: (...) (e) the redemption of a free discount voucher, where the taxable person supplying the goods or services to which the voucher relates receives consideration from the issuer.

input),[615] insofar as the supplied goods or services give rise to deduction.[616] The taxable amount for this redemption service shall be equal to the price reduction granted to the customer and reimbursed by the issuer, less the amount of VAT related to the supplied redemption service.[617] This can be illustrated in a diagram as follows:

Diagram 11



Total = 36 (20% VAT on 180)

By proposing the introduction of a 'redemption service', (the moon (☾) in *Diagram 11*) the Commission, in my view, seems to narrow down the solution to solving 'leapfrog' rebates to cases where the rebate is granted to parties that use vouchers for demonstrating their entitlement to the rebate. In my view, a 'redemption service' can only be performed by someone that takes care of some form of 'redemption', and from the proposal it is clear that this refers to the redemption of a voucher. Assuming that the Commission would aim for a principle-based solution, I find it strange that the 'leapfrog' rebate issues are only addressed in a 'voucher situation'. However, the definition provided for 'voucher' in the Explanatory Memorandum to the originally

615 The proposed provisions do not specify the recipient of the "redemption services", but it is made clear in the Detailed Explanation of the Proposal that this is to be considered a supply of a service from the redeemer to the issuer of the voucher (p. 12 of the proposal).

616 Proposed Art. 169(d): In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following: (...) (d) transactions relating to the payment of consideration by the issuer of a voucher to the taxable person supplying the goods or services to which the voucher relates in so far as the supplied goods or services give rise to deduction.

617 Proposed Article 74c: In respect of the supply of the redemption services referred to in point (e) of Article 25, the taxable amount shall be equal to the price reduction granted to the customer and reimbursed by the issuer, less the amount of VAT related to the supplied redemption service.

proposed rules could be interpreted as being broad enough to include every type of 'leapfrog' rebate: "(…) a voucher is an instrument which gives the holder a right to (…) receive a discount or rebate in relation to a supply of goods or services. The issuer assumes an obligation to (…) give a discount or pay a rebate".[618] Therefore, below I will assume that this originally proposed solution also applies to 'leapfrog' rebates where no actual (physical or electronic) vouchers are used.

The above example shows that the effect of the originally proposed rules on the total amount of VAT received by the treasury is the same as the total amount of VAT due under the current rules (compare Diagram 11 with Diagram 5). However, it is not explicitly clear from the originally proposed provisions that the taxable amount for the supply made by the retailer to the consumer, and for which the consumer pays with a 'money off voucher' as well as in cash, would no longer be the agreed price of the supply. This fact can be found in the Detailed Explanation of the (original, JB) Proposal,[619] in which it is stated that a free discount voucher is no longer to be treated as (third party) consideration for a supply. I would have preferred this fact to be explicitly included in the actual original proposal, by adjusting the provision determining the taxable amount for the supply made by the retailer, which also affects the amount of VAT that can be deducted if the retailer's customer is a taxable business. After all, the purpose of the original proposal was to create more clarity.

The original proposal therefore solved the issues concerning the incompatibility of the current EU VAT rules with the CJEU's rulings, as well as part of the 'gross-net-issue'. However, the original proposal only solved these issues with regard to the 'money off scheme', where the retailer is actually involved by receiving the amount of the cash-back directly from the (in my earlier examples) manufacturer as part of the payment for his supply. Under the 'cash back scheme', the retailer is not 'involved'. The retailer can, therefore, not perform the (originally) proposed 'redemption service' for the manufacturer, and neither can the consumer. This means that under the original proposal, different VAT treatments would apply to two similar promotional schemes where a manufacturer pays money to the person redeeming free face value vouchers that it distributed, thereby funding the purchase of goods that it manufactured, and possibly also depending on whether or not 'vouchers' were used to grant and obtain the 'leapfrog' rebate. I see no valid reason for the creation of a new service to solve the VAT issues for only one of these promotion schemes, and possibly not even for all of those specific schemes.

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618 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, p. 2, on-line source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF.

619 See Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not yet published in the Official Journal, Section 5 (Detailed Explanation of the Proposal), under Article 74c: "Since a free discount voucher is no longer to be treated as third party consideration for a supply (…)", on-line source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF.

Also, under the originally proposed rules for the 'money off scheme', the taxable amount at the level of the manufacturer is not adjusted, which would affect its pro rata if the manufacturer would also perform exempt supplies. Under the original proposal, a new pro rata 'issue' would also be created at the level of the retailer in case the vouchers are used to pay for VAT exempt supplies by it, because the retailer would perform an exempt supply (the supply of the star (☆) in *Diagram 11*) to a lower amount as well as a taxed 'redemption service' (the supply of the moon (☾) in *Diagram 11*).

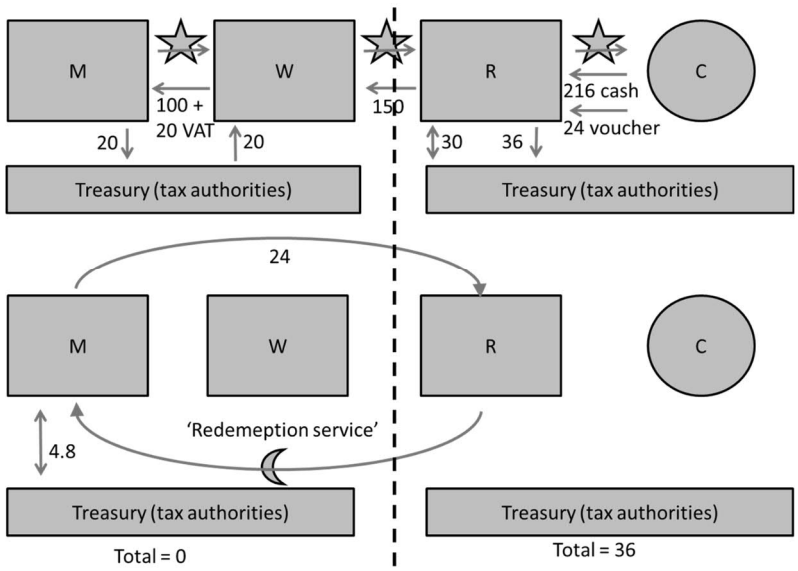
The cross-border supply chain issue, where under the CJEU rulings no adjustments are allowed if the goods are consumed in another EU Member State, even though the manufacturer has to remit VAT and finally receives less for his supply, is not solved by the originally proposed rules for the 'money off scheme' either, as I will demonstrate in the example illustrated in below diagram, even though it seems like it is actually solved at a first glance.

Beside the comments that I wrote myself about the original (or first) proposal,[620] in which I included many of the comments that I also include in this research, I've only come across one other publication on this proposal in English,[621] and it does not cover the issues I describe in this Section (Section 5.7)

620 Jeroen Bijl, *'VAT: 'Money Off Vouchers' and 'Cash Back Schemes' – What Are the Problems and How Can They Be Solved?'* (2012) 21 EC Tax Review, Issue 5, pp. 262–276 and Jeroen Bijl, *'VAT, Vouchers, Rights and Payments: The VAT Treatment of Vouchers'* (2013) 22 EC Tax Review, Issue 3, pp. 115–130.

621 A. Rodrigues and M. Lambourne, *Towards Clarification of the EU VAT Treatment of Vouchers*, Int'l VAT Monitor 4, pp. 237-241 (2012).

Diagram 12



By transforming the payment by the manufacturer (M) from a discount for its supply to the wholesaler (W)[622], to a 'redemption service' performed by the retailer (R) to M, different VAT rules apply to (the reason for) this payment. Under the relevant EU VAT rules, this (proposed) redemption service is subject to VAT ("taxable") in the country where the recipient of the service, i.e. M, is established.[623] M is liable to account for the VAT on this service as payable.[624] M can deduct this same VAT amount,[625] which it will do by offsetting it to the payable amount. Therefore, the net VAT effect of this payment is nil. This is the same result as under the CJEU rulings (Elida Gibbs and Commission v. Germany), but – as I explained before in Sections 5.5 and 5.6 – I do not agree with that outcome.

Another issue created by the proposed measures is the fact the profit margin of retailers may decrease if they participate in money off schemes for the supply of goods or services that are subject to a lower VAT rate, because they will have to account for VAT using the lower rate only on the non-discounted part of the payment received for their product, and apply the standard VAT rate to the supply of the redemption service. The opposite applies to the margin of the manufacturer: he can deduct the VAT (to the normal VAT rate) due on a redemption service whereas he paid VAT to the lower rate on his initial supply. Basically, in local transactions, under the rules originally proposed, the retailer would pay/fund the additional margin of the

622 Based on the principle that VAT should only be due on the amount finally received for the supply, even if the final consumption takes place in another Member State, this payment should lower M's tax base.

623 Art. 44 of the EU VAT Directive.

624 Art. 169 of the EU VAT Directive.

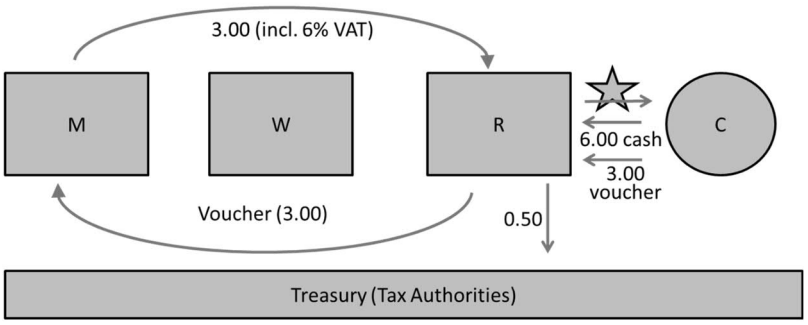
625 Insofar as the supplied goods or services give rise to deduction, see the proposed Art. 169(d) of the EU VAT Directive.

manufacturer, which has nothing to do with 'adjusting the VAT consequences of the original supply made by the manufacturer'.

I will demonstrate this with the following example, where all parties involved are established in a random jurisdiction that uses 21% as the standard VAT rate and 6% as the lower VAT rate. The amounts used for this specific example are different from the amounts used in the examples so far. In this example, the manufacturer (M) wishes to promote sales of its products by retailers (R). The retail price of the products in this example is 3.00 (inclusive of VAT) per product. M issues free vouchers to potential customers (C) of its products, which they can use to buy three certain products for the price of two. C will pay R the amount of 6.00 (inclusive of VAT) and a voucher. R will redeem this voucher, for which M pays R an amount of 3.00 (inclusive of VAT). Under the current rules, R will have to remit 6% from this amount, leaving R with a net turnover for this transaction of 8.50. Under the originally proposed rules, the payment by M to R is considered a separate 'redemption service' which is subject to the normal VAT rate (21%). R will now have to remit 21%VAT of the (VAT inclusive) payment it received from M to the tax authorities, which amounts to 0.52, and 6% VAT of the (VAT inclusive) amount it received from C, which amounts to 0.33. The total VAT amount that R will have to remit under the originally proposed rules is therefore 0.85. This means that under the originally proposed rules, R's net turnover regarding this transaction is 8.15 as opposed to the turnover under the current rules which is 8.50.

In a diagram, this can be illustrated as follows:

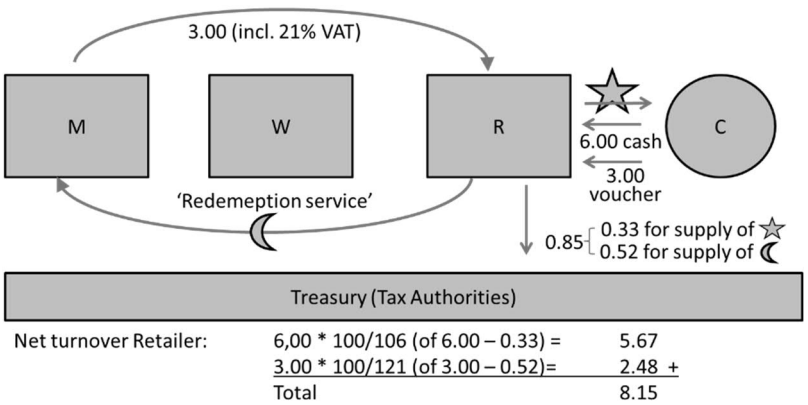
Diagram 13a - "Money off vouchers" – current situation where the supply by R is subject to the lower VAT rate



Net turnover Retailer:	9.00 * 100/106 (or 9.00 – 0.50) =	8.50

and

Diagram 13b - "Money off vouchers" – original proposal where the supplies by R are subject to two different VAT rates



Net turnover Retailer:	6,00 * 100/106 (of 6.00 – 0.33) =	5.67
	3.00 * 100/121 (of 3.00 – 0.52)=	2.48 +
	Total	8.15

Summarising the above, the originally proposed rules only apply to 'money off schemes' and not to 'cash back schemes', and possibly not even to all 'money off schemes'. By not addressing the VAT issues regarding 'cash back schemes' in this original proposal, the Commission did not provide a solution for a number of relevant issues regarding the VAT treatment of vouchers. Also, a potential pro rata issue is created by the proposed rules and the original proposal was, in my view, insufficiently clear about the taxable amount for the supply made by the retailer to the consumer. And lastly, the proposed rules could lead to an additional cost at the level of the retailers, if these retailers sell products that are subject to a lower VAT rate where these products are sold under the 'money off scheme'. The proposed rules did solve the 'practical allocation' issue, because they are no longer based on the adjustment of the taxable amount. In the end, I am not sad that the proposed new rules were never adopted. In my view, in many cases it is better to have no rules than bad rules.

5.8 An alternative solution: 'joint payment, shared deduction'

As mentioned in Sections 5.5 and 5.6, in my view, the 'economic reality' of the fact that the manufacturer is actually funding the purchase by the consumer of its own product as sold by another party further down the distribution chain (in the previous examples: the retailer), should be used as the basis of the VAT treatment of these scenario's. The most relevant issue, addressed by the CJEU in the Eilda Gibbs,[626] Commission v Germany[627] and Boehringer Ingelheim cases, is that the manufacturer incurs costs that should be considered business costs and that should lead to a lower total amount of tax payable by it, which is something that the current provisions of the EU VAT Directive do not allow.

626 C-317/94, *Elida Gibbs Ltd v Commissioners of Customs and Excise*, ECLI:EU:C:1996:400.

627 C-427/98, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2002:581.

I understand that the CJEU chose 'the path of the discount/rebate that lowers the taxable amount', because the result of both schemes (money off and cash back) is twofold:

- the supplier of the original good or service finally receives less for the supply of the product, or, in other words, by (partially) funding the sale of his own original product further down the distribution chain, the original supplier is left with less money; and
- the price of the product as originally sold by the business funding the transaction further down the distribution chain is actually lower, i.e. made more attractive to (potential) customers at a point in the distribution line that is most attractive to the business funding that transaction.

These two elements make the payment by the business that funds the transaction very similar to a 'price reduction after the supply has taken place', which, under the EU VAT rules, requires a reduction of the (original) taxable amount. However, as I explained above, I do not agree with the CJEU that treating the payment should be considered the granting of a discount. In these specific 'leapfrog' cases, where the original supplier of a good partially funds the sale/purchase of his own goods or services further down the distribution chain, I would adjust the VAT position of the original supplier in a different way, as I will describe in this subsection.

The Commission originally proposed to solve this issue for situations where the rebate was paid through (or the third-party payment was paid to) the retailer rather than directly to the customer, by splitting the original supply performed by the retailer into two separate transactions, making it possible for the manufacturer to become party to one of these transactions, the redemption service. As I demonstrated above, this solution does not solve all issues created by the inadequate EU VAT rules and the CJEU's rulings regarding these rules, and even creates some new ones.

I therefore suggest another approach, which makes the manufacturer a party involved in the sale of the goods by the retailer to the consumer. In my view, the fact that the original supplier of the goods or services partially funds a transaction involving his own goods or services 'involves' him in that transaction, but more so than he would be if he would make a third-party payment for goods or services that he has had no prior involvement in. The fact that this funding is the only way that allows him to ensure that the price of his product is lowered in the appropriate link in the distribution chain, in order to make the product more attractive to the purchasers that the original supplier wishes to target, makes this different from other 'third party payments'. The business is effectively making sure that his product costs less to the right customer (i.e. the customer that is targeted with the 'discount', to make the product more attractive compared to similar products).

However, different from the Commission's original proposal, under this approach the retailer still performs a single supply of goods or services and the taxable amount for

that supply is still the total amount received in return for that supply, including the payment received from the manufacturer.

Under my approach, the manufacturer becomes party to the supply by allowing the manufacturer to deduct the VAT on the supply made by the retailer insofar as the supply is funded by the manufacturer (through payment for redemption of its vouchers). This means that if this rule would be incorporated in the EU VAT Directive, the relevant provisions in the EU VAT Directive would have to reflect that for these specific types of 'leapfrog cash back schemes' and 'leapfrog money off schemes', the manufacturer is considered the purchaser of the good or service sold by the retailer, and allowed to deduct the VAT on the supply insofar as he actually pays for this supply, either by repaying part of the purchase price directly to the customer (under the 'cash back scheme') or by paying the retailer the face value of the vouchers used by the consumer as payment for the supply (under the 'money off scheme'). In both cases, the deductible amount should be calculated on the basis of the total (VAT inclusive) cost of the transaction for the customer, because even if the manufacturer would make a contribution towards a net consideration for, for example, a local supply subject to the reverse charge mechanism, this contribution is aimed at lowering the total cost of the final customer, i.e. an amount including the VAT due on the transaction.

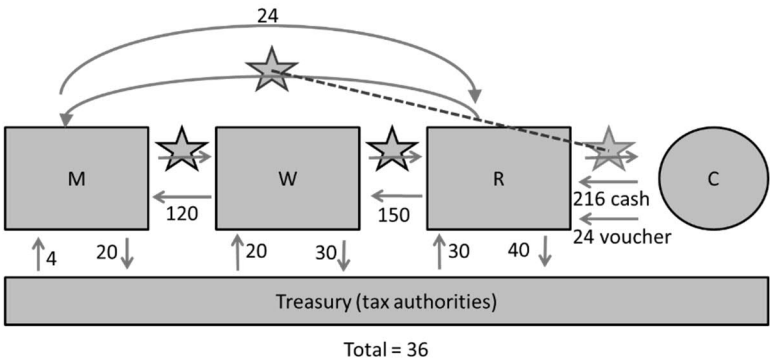
This means that in cases where the customer of the retailer is actually a business that can recover input VAT, it should only be allowed to recover the VAT on the part of the price that was not funded by the manufacturer. In essence, my solution means that for 'money off schemes' and 'cash back schemes' both the purchaser of the goods and the party funding the goods, i.e. the manufacturer, should be allowed to deduct the VAT that is due on the part of the taxable amount that they actually pay.

Even though this approach may seem strange at first glance, the new rules for transactions involving so-called 'single purpose vouchers', which are applicable from 1 January 2019, contain a similar mechanic (i.e. allowing two businesses 'shared' VAT deduction on a single (physical) supply):[628] under the new rules, where a retailer accepts a single purpose voucher as well as cash for a supply that costs more than the face value of the single purpose voucher, the business using the single purpose voucher can deduct VAT on the part of the consideration paid by him in cash (i.e. not using the single purpose voucher) and the issuer of the single purpose voucher can deduct the VAT on the part of that same supply as paid for with the voucher, insofar as he reimburses the retailer for that voucher. Basically, two businesses are allowed VAT deduction on a single (physical) supply. I will elaborate in this in Chapter 9.

In a diagram, my proposed solution of 'joint payment, shared deduction' can be illustrated as follows:

628 Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ L 177/9 of 1 July 2016, Articles 30a(2) and 30b(1).

Diagram 14a

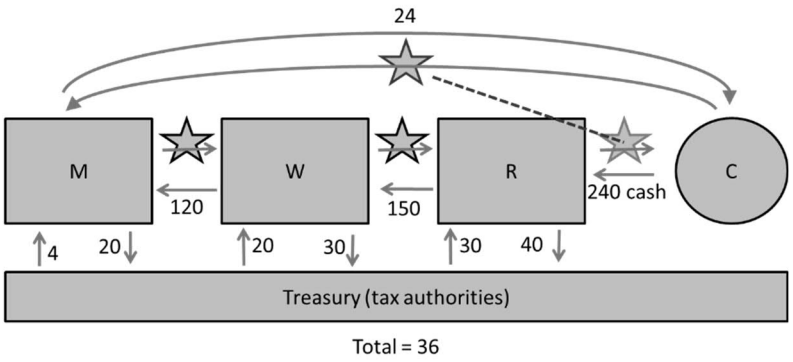


Total = 36

In this example of a leapfrog 'money off scheme', the total value of the supply made by the retailer
(☆) is 240 (200 and 40 VAT). The consumer (C) pays the retailer (R) an amount of 240, by using 216 in cash and 24 using a voucher. R sends this voucher to the manufacturer (M), who pays the face value in return. M should be allowed to deduct the VAT included in this amount (4). If C would not be a consumer but a fully taxable business, he would be able to deduct a VAT amount of 36. In this example, C is a final consumer, which means that the total amount of VAT paid to the treasury is 36, which is the same amount as envisaged by the CJEU and by the Commission in its original proposal.

The same would apply to a leapfrog 'cash back scheme' where the total value of the supply made by the retailer (☆) is 240 (200 and 40 VAT). The consumer (C) pays the retailer (R) an amount of 240. Subsequently, consumer (C) sends a voucher with a value of 24 using to manufacturer (M), who pays the face value to (C) in return. M should be allowed to deduct the VAT included in this amount (4).

Diagram 14b



Total = 36

In order to achieve the above result, the following issues have to be solved:

- Under the current rules, the manufacturer can only deduct VAT that is charged to it on an invoice in its own name for a supply of goods or that was made to him (i.e. he has to be the recipient of the supply); and
- There is no legal basis for lowering the amount VAT that can be deducted by the retailer's customer.[629]

Therefore, the current EU VAT rules would have to be amended, adapting them to the economic and commercial reality of the transactions that they should dictate. The business funding the transaction to which it is currently not considered a party should be allowed to deduct the part of the VAT it funds, even though no physical supply is made to him and even though he is no legal party to the transaction he funds. This should only be allowed in the exact cases as covered by the Elida Gibbs case: where the supplier or manufacturer of a product wishes to make this product more attractive (cheaper) in a place further down the supply chain, i.e. leapfrog rebates and discounts. At the same time, as mentioned above, the actual recipient/purchaser of the product should only be allowed to deduct the VAT on his purchase insofar as he actually pays this VAT. As mentioned, a 'shared' deduction mechanism is already introduced for transactions involving so-called single purpose vouchers,[630] which in my view means that within the EU VAT system, a legal basis exists for such mechanics. Allowing a business to deduct VAT on business related costs is, in my view, based on commercial and economic reality in the sense that it supports VAT neutrality.

The advantage of this 'joint payment, shared deduction' method is that it solves all of the issues that I identified earlier:

- Amendments to the relevant provisions in the EU Directive obviously solve the problem that it is impossible to apply the solution envisaged by the CJEU by applying the current EU VAT Directive;
- The 'gross-net-issue' issue is solved by using the VAT deduction mechanism rather than adjusting taxable amounts;
- The possible loss of turnover of the retailer, under the original proposal for EU voucher rules, would not occur;
- The 'pro rata issue' is solved because no taxable amounts are adjusted under this system and no additional supplies are introduced; and

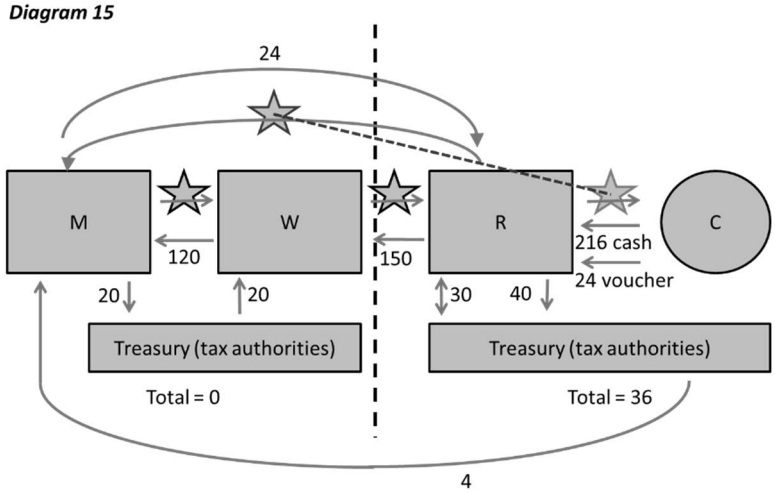
629 Even though the CJEU is of the view that Articles 184 and 185 should apply in these cases, I do not agree, certainly not in 'cash back' situations where the retailer can only issue an invoice to the full amount of the total supply because he does not know whether a voucher will be used. But also for 'money off' situations, a third party payment does not affect the VAT recovery right of the recipient of goods or services. Again, this disagreement is caused by the fact that the CJEU (also) considers these payments as rebates/discounts, whereas I don't, as I will explain in this subsection.

630 Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ L 177/9 of 1 July 2016, Articles 30a(2) and 30b(1).

- The potential cross-border issue of one government sponsoring consumption in another country is solved, as I will demonstrate in below example, illustrated in a diagram.

The 'joint payment, shared deduction' method is also firmly based on a principle that is also used (and relied on) by the CJEU in its rulings regarding this issue: the payments by the business funding the rebates/discounts for the supply of his own product further down the distribution chain should affect his VAT position. Even though the method chosen by the CJEU to achieve the VAT result of applying this principle is different from the one I advocate, the aim is basically the same: any VAT included in the payments made should reduce the total amount of VAT due. This is based on the economic and commercial reality of these types of business transactions, serving VAT neutrality by ensuring VAT is not a business cost and that similar transactions are treated the same for VAT. In my view, I have demonstrated sufficiently that this aim is better achieved through shared deduction of the VAT due on the supply than by lowering the taxable amount for the earlier, original supply.

Diagram 15



In the example in *Diagram 15*, where the Manufacturer (M) is established in a different EU Member State than the final consumer, the VAT refund (to the amount of 4) that is granted to the manufacturer (M) is a refund of foreign VAT, paid by the treasury of the country where the actual consumption takes place. This result is also in line with the purpose of EU VAT: the taxation of expenditure on local consumption.

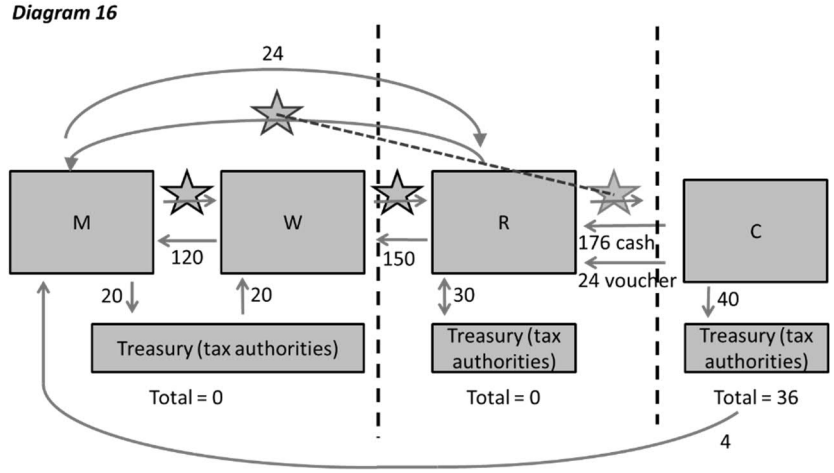
As I mentioned in Section 5.6.4, in cases where the payment for the 'leapfrog rebate' is used as funding for transactions where the recipient of the supply of goods or services is liable for the payment of the VAT due on the supply made by the retailer or in case of an intra-Community acquisition of goods by the customer of the retailer, the funding is used for the total cost of the transaction, i.e. the total amount paid by the

recipient including the VAT due on the transaction.[631] In these cases, the desired result can, in my view, only be achieved by requiring the customer of the retailer to account for output VAT on the full amount paid (i.e. also the part funded by the manufacturer), which to me is a reflection of the economic and commercial reality of these types of transactions. The manufacturer would then obtain a credit for the amount of VAT funded through payment of this 'leapfrog rebate'. This means that in these situations a VAT credit should only be granted to the amount of the VAT 'implicitly included' in the rebate, which is effectively used to fund a gross amount. Again, from a practical perspective this system should be based on a combination of a 'proof of funding' and the invoice: if the manufacturer has the proper combination of documents in its VAT administration, he should be allowed to apply the rules that I propose.

Based on the above, in cross-border situations, the manufacturer would obtain a VAT refund from another country (the country where C is established). If he possesses a combination of the 'proof of funding' plus a copy of the invoice for which the leapfrog rebate was used, mentioning local VAT, he should get a refund to the amount of VAT mentioned on the invoice under the system that I advocate. If, on the other hand, he possesses a combination of the 'proof of funding' plus a copy of the invoice for which the leapfrog rebate was used, mentioning that the VAT is due by the recipient of the supply, or an invoice for an intra-Community transaction, he should get a refund to the amount of VAT funded by the leapfrog payment, which is calculated by dividing the amount that is funded by the VAT inclusive amount due for the transaction.

In a diagram, the above can be illustrated as shown below. In this example, C is a taxable person without any right to deduct VAT, to make a better comparison with the other scenarios.

Diagram 16



631 Articles 196 and 200 of the EU VAT Directive.

The result of the application of the proposed system of 'joint payment, shared deduction' would lead to the same tax yield for the tax authorities in the country of consumption as under the system as envisaged by the CJEU and by the Commission in its original proposal.

If the VAT rates in the country that refunds the VAT to the manufacturer and the country where the manufacturer is established are different, the total effect for the manufacturer will not be exactly the same as under the rules created by the CJEU and originally proposed by the Commission. This is caused by the fact that the CJEU turned the 'third party payment' by the manufacturer into a reduction of its taxable amount, i.e. the basis for calculating its local VAT position. In its original proposal, the Commission tries to create the same effect by turning the manufacturer into the recipient of a redemption service. In my proposal, the third-party payment is what it is: a third-party payment. Because, in my system of 'joint payment, shared deduction', the payment is made for a transaction that entitles the manufacturer to apply for a refund, it is only logical that this refund can (also) be a refund of foreign VAT instead of (just) local VAT.

In my view, this solution of 'joint payment, shared deduction' is more in line with the economic and commercial reality as well as with the purpose of VAT, which is the taxation of expenditure for local consumption. Where a 'funded transaction' takes place in a different tax jurisdiction than the country where the funding business is established, the VAT consequences of the funding should be accounted for in the country where the final customer is established.

In the below example, I used different amounts than in my other examples to demonstrate the neutrality of my proposal for a system of 'joint payment, shared deduction' with regard to the VAT position of the manufacturer, the retailer, the customer as well as the treasury in the situation where the retailer is liable for the VAT on its supply as well as where its customer is (e.g. under the 'reverse charge mechanism').[632]

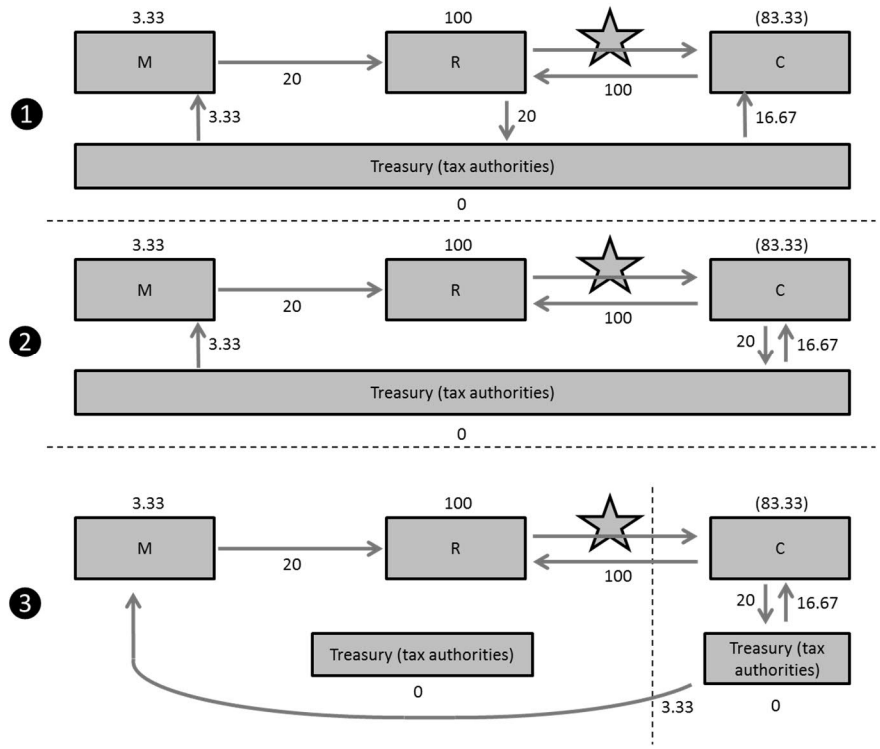
In this example, the retailer's customer can fully reclaim input VAT. I have used the 'leapfrog cash back scheme' in the example, but the net results would be the same, mutatis mutandis, for the 'money off scheme'. The net value of the supply by the retailer to its customer is 100 and the applicable VAT rate is 20%. The amount of the rebate is 10.

I have also compared the VAT consequences of a local supply and a cross border supply between the retailer and its customer, and the VAT position of both treasuries. In this example, I have only focussed on the VAT consequences of the transaction

632 Under the reverse charge mechanism, the recipient of a supply has to self-assess the VAT due on a supply to him, account for this VAT is his local VAT return and, if he is entitled to deduct VAT, deduct the VAT in the same VAT return. See, for example, Artt. 194-196 of the EU VAT Directive.

between the retailer and its customer, where the customer uses a voucher issued by the manufacturer to partially pay for its purchase. The first scenario (scenario ❶ in *Diagram 17*) is a local supply by the retailer where the retailer is liable for the VAT due on its own supply. The second scenario (scenario ❷ in *Diagram 17*) is different in the sense that the retailer's customer is now liable for the VAT due on the retailer's supply. In the third scenario (scenario ❸ in *Diagram 17*), the retailer and its customer are established in different countries. In this scenario, the recipient of the retailer's supply can be liable for the VAT due on the retailer's supply or on an intra-Community acquisition of goods.[633] The VAT refund received by the manufacturer is in all scenarios paid by the tax authorities of the country where the VAT on the transaction between the retailer and its customer is levied.

Diagram 17



In all three scenarios, the manufacturer (M) gets a refund of 3.33:
In the first scenario (❶), the retailer (R) will send M the 'proof of funding' (value: 20) as well as a copy of the invoice R issued to its customer (value: 120, including (and mentioning) 20 VAT). From that VAT amount of 20, M can claim 3.33, i.e. the part it actually funded (the amount funded/the total amount received for the supply including VAT, i.e. 20/120 or 16.67% of the VAT amount due (20)).
In the other two scenarios (❷ and ❸), R will send M the 'proof of funding' (value: 20)

633 Art. 200 of the EU VAT Directive.

as well as a copy of the invoice R issued to its customer (value: 100, without charging and therefore not mentioning any VAT). M can claim an amount of 3.33, which is the part of the VAT included in the total transaction price that it funded (the amount funded/the total consideration received for the supply including VAT, i.e. 20/120 (=20 (amount funded) / 20 (payment by M to R) + 80 (payment by C to R) + 20 (payment by C to treasury)) or 16,67%)of the VAT due on the transaction (20).

In all three scenarios, the retailer (R) will receive the net amount it charges its customer (C) for the transaction: 100. In the first scenario, R charges C a net amount of 100 and a VAT amount of 20, which R remits to the tax authorities. C pays R 80 and a voucher with a value of 20, which R sends to M together with a copy of the invoice issued to C, for which M pays R 20, leaving R with the amount of 100. In the other two scenarios, R charges and receives 100 and no VAT. The rest of the scenarios remain unchanged for R.

In all three scenarios, the customer (C) actually pays an amount of 83.33. In the first scenario, C receives an invoice for 120, mentioning 20 as the VAT amount due on this transaction and 100 as the net taxable amount. C pays 100 in cash for this transaction, and also gives the retailer a voucher with a value of 20, for which C paid nothing. From the 20 VAT mentioned on the invoice, C can claim the part of the total transaction price that it funded (100/120), i.e. 16.67. This means that the total (net) cost of the purchase in this scenario is: 83.33 (100 – 16.67). In the last two scenario's C does not pay the VAT amount due on its purchase to the retailer, but directly to the tax authorities. This means that C pays R 80 and a 20 value voucher that C got for free, and that C pays the tax authorities the VAT due on 100, which is 20. Therefore, C pays a total amount of 100. From the 20 VAT C paid the tax authorities, C can claim the part of the total transaction, including VAT, that C funded (100/120): 16.67. This means that the total (net) cost of the purchase in this scenario is: 83.33 (100 – 16.67). In my view, the described VAT treatment of these scenarios also reflects the economic and commercial reality of these scenarios.

5.8.1 'Joint payment, shared deduction' also applicable to other rebates granted by another person than the party making the (direct) supply?

In section 5.4.6 I described other rebates granted by other persons than the party making the (direct) supply. In my view, based on the same rationale as I described above, a business granting such rebates should be able to deduct the VAT on the part of the transaction it funds under the proposed 'joint payment, shared deduction' rules. This should of course only apply to situations where the economic and commercial reality of the transaction would be that these payments should be treated the same as other payments for goods or services that are used for the taxed transaction of the business.

The concept of 'joint payment, shared deduction' could possibly even have a wider application than only to discounts and rebates. However, even though in my view, this would deserve additional, separate research, it is outside the scope of this thesis. It could (and should) be the basis for future research.

5.9 Conclusion with regard to the VAT treatment of leapfrog cash back and money off schemes

In this Chapter (in Sections 5.5, 5.6, 5.7 and 5.8) I have elaborated on the need of a proper VAT treatment of scenario's where a business (partially) funds a transaction further down the distribution chain regarding his own product, where, form a legal perspective, he is not party to the agreement regarding the supply/purchase of that good. The fact that, for this business, funding that transaction through either a cash back or a money off scheme is the only way to assure that he can decrease the price of a product for the purchaser that he wishes to attract (by making his product more attractive, compared to similar products), makes that this funding is a proper business expenditure and that this payment should affect the VAT position of the business making it. If the funding business would be able to grant the same discount amount directly, i.e. to its own customer, his VAT position would, after all, be affected as well.

I have also demonstrated that, due to the nature of this 'leapfrog funding', the payment cannot be considered a true 'discount' for VAT purposes, and it isn't a proper 'third party payment' in the VAT sense either. This means that the solution to this VAT issue that the CJEU came up with to adjust the bottom-line VAT position of the business funding the transaction is, in my view, not the best solution. The solution suggested by the European Commission in its proposal for adjustments to the EU VAT Directive is, in my view, not the best solution either.

The outcome of the CJEU's solution is based on the principle of neutrality and on the 'economic and commercial' reality that a business making a (VAT inclusive) payment for the purpose of his business (by, ultimately, receiving less for his original supply), and VAT is only charged on the actual consideration paid by the final consumer. Using 'the purpose of EU VAT' and 'economic and commercial reality' from my research framework as tests, I can only come to the conclusion that the CJEU's solution is in line with desired or appropriate law. However, as I demonstrated in Sections 5.4 to 5.8, the CJEU's solution deviates from what is actually written in the EU VAT Directive that I am of the view that a better solution is needed.

In Section 5.8, I have explained why, in my view, a system of 'shared payment and joint deduction' would be the best solution to the VAT issues surrounding cash backs and money offs. The issues that remained unsolved or that were created by the existing and/or other suggested solutions are all resolved under this system.

5.10 Discounts and rebates: summary

The EU VAT rules for granting discounts and rebates, either at the time of the supply or after the supply, directly to the customer that purchased the goods or services are very straightforward. Discounts (granted at the time of the supply) should not be included in the taxable amount, and rebates (granted after the supply) should reduce the 'original' taxable amount.

Businesses, tax authorities and courts have struggled with the VAT treatment of 'leapfrog' discounts and rebates. The CJEU has tried to solve these issues by allowing businesses that grant these 'leapfrog' discounts and rebates the same treatment as businesses granting rebates: they should be allowed to reduce the basis for taxing their originally supplies (their taxable amount) with the amount of the 'leapfrog' discount or rebate that they pay. Even though this solution solved the issues from an economic and commercial perspective and fitted well within the system of EU VAT, aiming to only tax expenditure on local consumption, it created some other issues. I have presented an alternative VAT treatment of 'leapfrog' discounts and rebates that still meets the teste of my own research framework, but that also solves the issues created by the CJEU's solution.

Leapfrog discounts and rebates should, in my view, be treated by allowing the business that grants the discount or rebate to claim VAT on the supply that he has funded from the local tax authorities of the jurisdiction where that supply takes place. The VAT paid on the remaining part of the consideration can be deducted by the customer, insofar as he has the right to deduct VAT. This solution reflects the economic and commercial reality under which businesses should be entitled to take these 'leapfrog' discounts and rebates into account for VAT purposes. Also, the purpose of EU VAT, i.e. the taxation of expenditure for local private consumption, is left intact by this solution. I call it a system of 'joint payment and shared deduction'.

6 The VAT treatment of supplies for no consideration

6.1 Introduction

Once it is established that a certain supply, involving a voucher, is performed free of charge, it has to be determined whether that transaction needs to be taxed, at what point in time it should be taxed and how to determine the taxable amount for these transactions. Also, if certain transactions involving vouchers that are performed for no consideration should not be taxed, such as the issue and transfer of MPVs, it should be determined what the proper VAT treatment of these transactions should be. The basis for answering these questions is laid in this Section.

Free supplies, or supplies for no consideration, are part of the 'promotional mix', as described in Section 1.1. Giving away goods or services for free with certain (amounts) of purchases may entice customers to buy certain products or to buy more products. As a promotional activity, goods and services can also be given away for free by giving away free vouchers that can be redeemed for these goods or services.

Giving away goods and services for free to customers leads to consumption. As VAT is aimed at taxing (expenditure for) local private consumption, in this Chapter I will research the current and appropriate or desirable VAT treatment of free supplies. The tension between the right to deduct VAT on business related costs and the need to tax consumption, as described in Section 1.1, requires that I apply the test of 'commercial and economic reality' to the VAT treatment of supplies made for no consideration. Establishing the appropriate VAT treatment of free supplies helps me to establish the appropriate VAT treatment of vouchers, which I will do in Chapter 9.

6.2 Introduction to the VAT treatment of 'free' supplies

VAT is due on the supply of goods and services for consideration by a taxable person acting as such. This means that, as a rule, a consideration is required for a transaction to be subject to VAT. Because VAT aims to tax consumption (or rather, expenditure on local consumption)[634] and because consumption can also be the result of a transaction that is not made for consideration, the EU VAT Directive contains provisions that ensure that transactions that result in consumption are also taxed where there is no consideration.

Taxation of supplies that are not made for consideration can be achieved by either (retroactively) disallowing deduction of VAT on the costs of the goods and services insofar as these are not used for taxable business activities,[635] or by taxing these

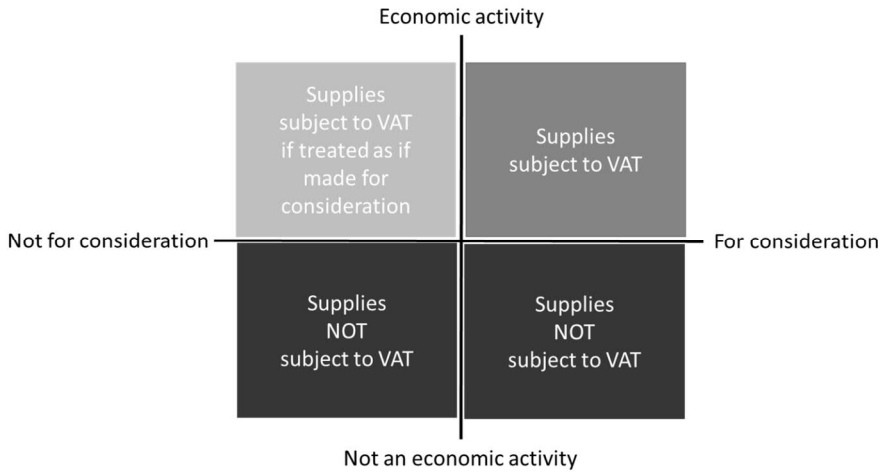
634 See Section 2.4.4.

635 Artt. 176, 177 and 184-186 of the EU VAT Directive.

activities by treating them as if they were supplies made for consideration.[636] Originally, the EU VAT legislator allowed the taxpayers to choose which of these two adjustment systems they wanted to apply.[637] Under the later and current VAT rules, the 'main' system requires businesses to apply the latter system (taxing the application of the goods or services by deeming them to be supplied for consideration).[638,639] Different rules exist for situations where, for example, the consumption takes place outside the scope of VAT (as a non-economic activity) or where an immovable property is partially used for non-business purposes (consumption), as I will now describe.

6.2.1 Free transactions and non-economic activities

In Chapters 3 and 4, I have established the criteria for determining whether a supply, or an element included in a multiple-element transaction, is made for consideration. In this Chapter, I will examine the VAT consequences of supplies (or parts of supplies) that are not made for consideration.



636 Artt. 16 and 26 of the EU VAT Directive.

637 Proposal for a second Directive for the harmonization among Member States of turnover tax legislation, concerning the form and methods of application of the common system of taxation on value added, COM (65) 144 final, 13 April 1965, Supplement to the Bulletin of the European Economic Community No. 5, 1965, p. 32: *"As regards the withdrawal of a good purchased by a taxpayer, Member States are free not to apply the tax but instead to disallow the deduction or to rectify the assessment in case the deduction has already been allowed."*

638 Proposal for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950 of 20 June 1973, Bulletin of the European Communities 1973, Supplement 11/73, OJ C 80, 5 October 1973, p. 10: *"(…) to avoid the enjoyment of unjustified advantages by taxable persons who are entitled to deduct input tax, application of goods to own use, and transfers of goods from a taxable to an exempt business are treated as taxable supplies. The same aim could have been attained by means of adjustments to deduction already made, but the technique of treating these transactions as taxable supplies was chosen for reasons of impartiality and simplicity*".

639 Unless Member States had a system of disallowing deduction of VAT on specific costs in place before the coming into force of the Sixth EU VAT Directive. See Art. 17(6) of the Sixth EU VAT Directive, now Art. 176 of the EU VAT Directive.

As discussed in Chapter 3, economic activities that are performed for consideration (i.e. supplies of goods and the provision of services are subject to VAT if all relevant requirements are met. It is also possible that a taxable person, acting as such, performs these economic activities for no consideration. In this Chapter, I will examine the VAT consequences of those (economic) activities. In Chapter 3.9, I grouped these transaction in the top-left quadrant of the below matrix. I will also briefly touch upon the VAT consequences of non-economic activities, but because this research focuses on the VAT treatment of promotional activities, and more specifically activities involving vouchers, and those activities are, in my view, always economic activities, I focus on the economic activities performed for free.

6.2.2 VAT consequences of non-economic activities

Transactions that are not economic activities, even if they are made for consideration, are outside the scope of VAT.[640] This means that the VAT on costs incurred in relation to non-economic activities cannot be deducted, because under Article 168 of the EU VAT Directive, VAT on the purchase of goods or services can only be deducted in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person. Also, the CJEU has confirmed in the VNLTO case[641] that the mechanism included in the VAT Directive, which allows deduction of VAT on certain purchases of capital goods followed by taxing the 'non-business' or consumptive use of these goods, does not apply to situations where these goods are used for non-economic activities. However, this seems to be different in situations where the VAT on the costs of capital goods was already deducted and where the business use decreases after the initial deduction.[642] I will elaborate on this in Section 6.3.2.1.

6.2.3 Free supplies as promotional activities

Businesses use consumer sales promotions to influence their market share across all outlets and sales channels. Examples of popular forms are: vouchers and coupons (which I discuss in Chapter 9), discounts and rebates (which I discuss in Chapter 5), samples (to be discussed in this Chapter), sweepstakes (discussed in Chapter 8), price and value packs (discussed in Chapter 4) and free goods and services (to be discussed in this Chapter), where specialty items[643] represent a species of free goods.

In this Chapter I will discuss the VAT treatment of the supply of specialty items, price and value packs, samples and other types of free and/or composite supplies where elements to the composite supply are made for free, focussing on business gifts (as part of the 'promotional mix').

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640 See Section 3.5.3.

641 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88.

642 CJEU case C-36/16, Minister Finansów v Posnania Investment SA, ECLI:EU:C:2017:361.

643 Specialty items are gifts for customers/prospects with the business' name or logo on them (e.g. hats, golf balls or pens), the function or use of which often has nothing to do with the actual products or services sold by the business.

First, I will briefly reiterate why gifts have a special position in VAT, this being the reason that 'gifts' deserve a dedicated section in this research. Subsequently, I investigate when and why transactions actually qualify as (the supply of) gifts from a VAT perspective. I will then focus on the actual VAT treatment of gifts and then conclude with my view on what the VAT treatment of gifts should be.

6.2.4 Gifts and VAT

As mentioned above, taxation of supplies that are not made for consideration can be achieved by either (retroactively) disallowing deduction of VAT on the costs of the goods and services that are not used for taxable business activities,[644] or by taxing these activities as 'deemed supplies'. In the current EU VAT system, the 'main rule' requires businesses to apply the latter system (taxing the application of the goods or services by deeming them to be supplied for consideration).

The above means that, as a main rule, the supply of 'free' goods or services by businesses is subject to VAT.[645,646] The same applies to the element(s) that is (are) supplied for free (the 'gift elements') in composite supplies.

6.2.5 When is a supply made 'free of charge' or not made 'for consideration'?

The concept of 'gift' itself is not unambiguous. In the dictionary, a 'gift' is defined as 'a thing given willingly to someone without payment; a present'.[647] This definition implies that a gift does not require a reciprocal action. In some legal systems, a gift requires the recipient to actively accept it as such,[648,649] but accepting a gift is not a 'reciprocal action' from an EU VAT perspective.

In marketing psychology, the act of giving is driven by the fact that most recipients, accepting the gift, will feel more inclined to accept sales offers from the person (or

644 Artt. 176, 177 and 184-186 of the EU VAT Directive.

645 This is the main rule, which I will discuss in depth in Section 6.3.3, where I will also describe the exceptions to this rule.

646 Services that are performed free of charge are only subject to VAT (or rather: treated as if they were performed for consideration) if they are used for the private use of a taxable person or that of his staff, or, more generally, for purposes other than those of his business (Article 26 of the EU VAT Directive). This means that in general, the consumptive use of services is taxed in fewer situations that the consumptive use or application of goods. I will examine this difference in Section 6.3.3.

647 Oxford Dictionaries, free online version, last visited on 27 February 2019: http://www.oxforddictionaries.com/definition/english/gift?q=gift

648 Otherwise you could leave your garbage in your neighbour's garden as a 'gift'.

649 In the Dutch Civil Code (Burgerlijk Wetboek), a gift is deemed to be accepted if it is not rejected without delay after the recipient has become or has been made aware of the offer (Art. 7:175 BW, to be accessed online in Dutch on http://wetten.overheid.nl/BWBR0005290/2017-10-10#Boek7_Titeldeel3_Artikel175, last accessed on 27 February 2019).

business) that gave them a gift.[650],[651] Something similar applies in economics. From an economic and commercial reality point of view, it could be argued that there is no such thing as a free lunch,[652] implying that no business will ever give something away without expecting something in return.

What does this mean? Is a gift really free or, in 'VAT speak'[653], 'not for consideration', or can some business gifts actually be considered to be supplied for consideration because a reciprocal supply is expected or certain? Is, for example, the music played in the streets by a busker a 'gift to the public' or a supply of a service for consideration? After all, some form of revenue is to be expected, otherwise the busker would not be in this 'business'. And if a business hands out a large number of free pens with its contact details on it, it can be expected that at least one of the users of those pens will actually contact the business for a (subsequent) paid transaction? Are these supplies made 'for free' or 'for (some form of) consideration'? As I demonstrated in Chapter 3, for VAT purposes, this depends on the 'degree of directness' of the link between the supply and the (reciprocal) action.

6.3 VAT consequences of supplies not made for consideration

Under the relevant EU VAT rules, supplies of goods and services are only taxable if they are made for consideration.[654] Because VAT is a tax on consumption,[655] transactions for no consideration that lead to consumption should also be taxed.[656]

Full deduction of VAT on costs for goods or services that will be (partially) used for consumption purposes followed by taxing the consumption is preferable over disallowing deduction, because the principle of the neutrality of VAT with regard to the

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650 Robert B. Cialdini, Influence (Science and Practice), Pearson Education, Fifth Edition (Upper Saddle River (US-NJ), Prentice Hall, 2009), 18-33.

651 See also the following quote from the opinion of CJEU's AG Jääskinen of 15 April 2010 in case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:194 (underlining by me, JB): "Essai sur le don, first published in 1925 by Marcel Mauss, a famous French anthropologist, aimed at showing that in archaic societies exchanges and contracts take place in the form of presents. In theory they are voluntary; in reality they are given and reciprocated obligatorily".

652 Milton Friedman, There's No Such Thing as a Free Lunch, Open Court Publishing Company, 1975.

653 Free after George Orwell's world-famous term 'Newspeak', from the novel Nineteen Eighty-Four, Secker and Warburg, London, 1949 (see also the appendix to this book).

654 See Article 2(1)(a) and (b) of the EU VAT Directive.

655 See Article 1(2) of the EU VAT Directive.

656 See, for example, CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 54: "(…) the Court has already held that, by treating the private use of goods treated by the taxable person as forming part of the assets of his business as a supply of services for consideration, Article 6(2)(a) of the Sixth Directive aims, first, to ensure equal treatment as between a taxable person, who was able to deduct the VAT on the acquisition or construction of those goods, and a final consumer, by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them, and, second, to ensure fiscal neutrality by ensuring a correspondence between deduction of input VAT and charging of output VAT".

taxation of the business requires that the investment expenditure incurred for the needs and objectives of a business be regarded as economic activities giving rise to an immediate deduction of input VAT due. [657] The deduction system is meant to relieve the taxable person entirely of the burden of the VAT payable or paid in the course of all his taxable economic activities.[658]

The main reason for me to prefer the deduction system followed by taxation of consumption is that, at the time of deduction, the exact (extent or timing of any) private use is often not known. As examples I mention a company car that is also used for commuting (which, from a VAT perspective, is considered private use) or the purchase by a shop-owner of a large number of pots of jam, some of which he will take out of his stock for private use. At the time of the purchase and initial VAT deduction, it is only possible to make an (educated) estimate of the actual (amount of) private use. Therefore, disallowing deduction will in most cases not lead to taxation of actual private use, unless this is done retroactively. This can only be the case if the initial deduction can later be adjusted (i.e. increased or decreased), which is, in fact, similar to an adjustment made by taxing the private use. Disallowing deduction of VAT on costs attributable to consumption is in my view a viable alternative that would avoid the 'financial advantage' for taxpayers of full deduction followed by staggered imposition of VAT on the consumptive use of the good.[659] However, I prefer the first system because this allows businesses not having to pre-finance VAT (by not deducting it) on possible, uncertain future consumption. VAT should preferably be imposed on actual consumption rather than on predicted or foreseen, estimated consumption.[660]

I will first discuss situations where no deduction of VAT is allowed and then the system of, in principle, full deduction followed by taxation of private use.

6.3.1 VAT deduction: a fundamental principle underlying the system of VAT that, in principle, may not be limited

The right to deduct VAT, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT that in principle may not be limited.[661] It is exercisable immediately in respect of all the taxes charged on input

657 See, for example, CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 47.

658 See, for example, CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 47.

659 See CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254.

660 In the same sense see, for example, CJEU case 154/80, Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats, ECLI:EU:C:1981:38.

661 See, for example, CJEU case C-74/08, PARAT Automotive Cabrio Textiltetőket Gyártó Kft. v Adó- és Pénzügyi Ellenőrzési Hivatal, Hatósági Főosztály, Észak-magyarországi Kihelyezett Hatósági Osztály, ECLI:EU:C:2009:261, paragraph 15 and the case law cited there.

transactions.[662] The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT.[663]

Insofar as the taxable person, acting as such at the time when he acquires goods or receives services, uses those goods or services for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of those goods or services. The existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement.[664]

The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct.[665]

A taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole. On the other hand, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted.[666]

The tax authorities and the national courts, in the context of the direct-link test that is to be applied by them, should consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively

662 For an elaborate discourse (in Dutch) on the deduction of VAT I refer to K.M. Braun, Aftrek van voorbelasting in de BTW (Fiscale Monografieën, nr. 99) (diss. Leiden) , Deventer: Kluwer 2002 and S.T.M. Beelen, Aftrek van BTW als (belaste) omzet ontbreekt (Fiscale Monografieën, nr. 134) (diss. Rotterdam) , Deventer: Kluwer 2010.

663 This subsection is largely based on CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683, paragraphs 25-31 and the case law cited there.

664 See, for example, CJEU cases C-249/17, Ryanair Ltd v The Revenue Commissioners, ECLI:EU:C:2018:834, paragraph 26 and C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683, paragraph 28 and the case law cited there.

665 See, for example, CJEU case C-249/17, Ryanair Ltd v The Revenue Commissioners, ECLI:EU:C:2018:834, paragraph 26.

666 See, for example, CJEU case C-249/17, Ryanair Ltd v The Revenue Commissioners, ECLI:EU:C:2018:834, paragraph 27 and the case law cited there.

linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question.[667]

The CJEU has repeatedly held that if costs can be directly attributed to the application of capital business assets or of services for private consumption,[668] the VAT on the costs attributable to these activities can be deducted because these activities are treated as supplies for consideration.[669]

Giving away goods or services for free as a promotional activity, possibly through the use of vouchers, is intrinsically linked to and performed for the purpose of a business' main activities: selling goods or services and increasing those sales. This means that even though giving away goods or services for free or allowing (potential) customers to use goods or services free of charge, could be qualified as consumption that should be taxed, VAT on these (business) costs should (also) be deductible.

6.3.2 Disallowing deduction

Even though the right to deduct VAT may in principle not be limited, under the current EU VAT rules, VAT on purchases is not allowed, or may not be allowed, in the following five cases:
(i) if the costs are attributable to VAT exempt transactions without the right to deduct VAT,
(ii) if the costs are attributable to non-economic activities
(iii) if the costs are attributable to consumptive use of an immovable business asset,
(iv) if the costs exceed the amount which was objectively necessary to allow a business to carry out its taxed transactions, and
(v) if costs are incurred for which VAT recovery is not allowed under a so-called 'stand still' provision.

I will elaborate on the effects of VAT exemption (i) in the section about transactions that are deemed to be made for consideration below. The other four situations I will briefly discuss now.

6.3.2.1 No recovery of VAT on costs for non-economic activities

A taxable person cannot deduct VAT on costs that he incurs for non-economic activities. Non-economic activities are activities that are not considered to be performed by a taxable person acting as such. These activities are, therefore, outside the scope of the EU VAT Directive. Examples, from CJEU case law, of non-economic activities are: the 'passive' holding of shares (which is considered an activity

667 See CJEU case C-249/17, Ryanair Ltd v The Revenue Commissioners, ECLI:EU:C:2018:834, paragraph 28.

668 By 'for private consumption' I mean the transactions treated as if they were made for consideration under Articles 16 and 26 of the EU VAT Directive.

669 See, for example, CJEU cases C-97/90, Hansgeorg Lennartz v Finanzamt München III, ECLI:EU:C:1991:315, paragraph 26 and C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, parahraphs 39-42.

performed as a shareholder, not a business activity),[670] promoting the general interest[671] and certain activities performed by government authorities in which they engage as public authorities.[672] Also, as explained in Chapter 3, supplies, even if made for consideration, by a person not acting in its capacity of a taxable person are also considered non-economic activities. The same applies to activities subject to a total prohibition on importation and marketing in the EU: these are considered to be outside the scope of VAT.[673] The VAT incurred on costs relating to these activities is not deductible.

In the provisions regarding taxation of private consumption of business goods and services, the description of the taxable event includes transactions by a taxable person "for purposes other than those of his business".[674] These transactions do not include non-economic activities. If that would be the case, then the very definition of 'taxable transactions' under the EU VAT Directive ("the supply of goods or services effected for consideration (…) by a taxable person acting as such") would be rendered meaningless.[675]

The "purposes other than those of his business" are to be interpreted as meaning "for the purpose of private consumption by a private individual". This view is supported by the CJEU where it held that it follows from the structure of the EU VAT Directive that the provisions [re. taxation of private use, JB] is designed to prevent non-taxation of (…) use for private purposes.[676]

Strangely, the CJEU seems to hold that certain non-economic activities can also qualify as 'business transactions' (as opposed to transactions 'for purposes other than those of his business').[677] In my view, the Union concept of "business activities" (or any other concept) from the EU VAT directive cannot be applied to activities that are outside the scope of that VAT Directive.

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670 CJEU case C-60/90, Polysar Investments Netherlands BV tegen Inspecteur der Invoerrechten en Accijnzen, ECLI:EU:C:1991:268.

671 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88.

672 Article 13(1) of the EU VAT Directive.

673 CJEU case C-289/86, Vereniging Happy Family Rustenburgerstraat tegen Inspecteur der Omzetbelasting, ECLI:EU:C:1988:360.

674 Articles 16 and 26 of the EU VAT Directive.

675 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraph 38.

676 See the Opinion of Advocate General Mengozzi in case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2008:769, point 49 and the CJEU case law referred to in (the footnote to) that point.

677 See CJEU cases C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraph 39 and C-92/13, Gemeente 's-Hertogenbosch v Staatssecretaris van Financiën, ECLI:EU:C:2014:2188, paragraph 33 ("(…) for its business activities as a public authority (…)".

6.3.2.2 No recovery of VAT on immovable property used for private consumption

Before 2011, the VAT on expenditure related to immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person's business and for private purposes, was fully deductible. The actual private use was taxed. Even though this VAT treatment was in line with the EU VAT rules of that time, the 'financial advantage' that taxable persons had compared to non-taxable persons was considered unfair.[678] This resulted in the introduction of Article 168a in the EU VAT Directive, effective 1 January 2011. This provision is meant to ensure that taxable persons are dealt with in an identical manner whenever immovable goods that they use for their business activity are not used exclusively for purposes related to that activity. With a view to ensuring an equitable deduction system for taxable persons in the context of the new rule, an adjustment system of deductions is provided for which takes into account changes in the business and non-business use of the property concerned during a certain period of time.[679]

Under this new provision, in the case of immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person's business and for private consumption, VAT on expenditure related to this property is deductible only up to the proportion of the property's use for purposes of the taxable person's business. Changes in the proportion of use of immovable property referred to in the first subparagraph shall be taken into account in accordance with the principles normally applied to changes of the use or application of such property between VAT exempt and taxed business activities, sometimes referred to as the 'revision rules' or the 'capital goods scheme'.[680]

Under the same provision, Member States may also apply these rules in relation to VAT on expenditure related to other goods forming part of the business assets as they specify,[681] because the 'financing advantage'-issue also arises, though in a less significant and less uniform manner, with respect to movable goods with a durable nature.[682]

Even though Member States may regard as capital goods those services which have characteristics similar to those normally attributed to capital goods, they may, under the current EU VAT Directive, only do this for the application of the application of the 'revision rules'.[683] Under CJEU case law, an item which forms, in its entirety, part of

678 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254.

679 See points 8-12 of the Preamble to Council Directive 2009/162/EU, amending various provisions of Directive 2006/112/EC on the common system of value added tax, OJ L 10/14 of 15 January 2010.

680 See Article 168a(1) of the EU VAT Directive.

681 See Article 168a(2) of the EU VAT Directive.

682 See points 11 of the Preamble to Council Directive 2009/162/EU, amending various provisions of Directive 2006/112/EC on the common system of value added tax, OJ L 10/14 of 15 January 2010.

683 See Article 190 of the EU VAT Directive.

the assets of a business and that was the result of alterations may be regarded as a separate capital item to which the above rules apply as well.[684]

As I will also explain below, some 'free consumptive use' of immovable business assets is not taxed, but the VAT on that use should still be deductible. Examples of this are the free use of a parking lot of a supermarket or even the 'free access' to the building in which that supermarket is located. This is free use 'for the purpose of the business' of that taxable person (see above). This means that these costs can be considered part of the general costs of a business and that they are, as such, components of the price of the goods or services which the business supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole.[685] The VAT on such costs can be deducted by the business insofar as it is allowed to deduct VAT. Another example of such an investment from CJEU case law is a freely accessible mythological exploration path that is used to attract people who can then purchase goods and services from the business that operates the path.[686]

6.3.2.3 No recovery of VAT on costs that exceed what is objectively necessary to allow a business to carry out its taxed transactions

This is a relative 'newcomer' to the scene of non-deductible VAT. The concept was introduced by the CJEU in the Iberdrola-case,[687] where a business took upon it the costs of restauration/refurbishment of an immovable property belonging to an unrelated third party, because it needed that property to function properly to ensure that the business could perform its own, taxed, business activities.

Without the reconstruction of that pump station (the immovable property belonging to the third party), it would have been impossible to connect the buildings which the business planned to build (and exploit for consideration) to that pump station, with the result that that reconstruction was essential for completing that project and that, consequently, in the absence of such reconstruction, the taxable person would not have been able to carry out this economic activity.

According to the CJEU, the circumstances of the case were likely to demonstrate the existence of a direct and immediate link between the reconstruction service in respect of the immovable property belonging to the third party and a taxed output transaction by the business, since it appears that the service was supplied in order to allow the latter to carry out the construction project at issue in the main proceedings. The fact that the third party also benefitted from that service could not justify the right to

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684 See CJEU case C-334/10, X v Staatssecretaris van Financiën, ECLI:EU:C:2012:473, paragraph 16.

685 CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683, paragraph 29 and the case law cited there.

686 CJEU case C-126/14, UAB "Sveda" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, ECLI:EU:C:2015:712.

687 CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683.

deduct corresponding to that service being denied to the business if the existence of such a direct and immediate link was established.[688]

In that regard, the CJEU considered it to be necessary to take into account the fact that the input reconstruction service at issue in the main proceedings is a component of the cost of a taxed output transaction by the business. According to the CJEU, the referring court should examine whether that service was limited to that which was necessary to ensure the connection of those buildings to the immovable property at issue in the main proceedings or whether that service went beyond that which was necessary for that purpose.[689]

In the first situation, it would be necessary to recognise a right to deduct the input VAT levied on all the costs incurred for the reconstruction of the pump station since those costs can be regarded as having a direct and immediate link with the general costs connected with all the economic activities of the taxable person. However, if the reconstruction works relating to that pump station exceeded the needs created solely by the buildings constructed by the taxable person, the existence of a direct and immediate link between that service and the taxed output transaction by the taxable person, consisting of the construction of those buildings, would be partially broken and a right to deduct would thus have to be recognised in respect of the taxable person only for the input VAT levied on the part of the costs incurred for the reconstruction of the pump station which was objectively necessary to allow the taxable person to carry out its taxed transactions.[690]

It seems that the CJEU introduced a kind of 'necessity test' for the deduction of VAT on costs or investments that also benefit a third party. Because the relevant CJEU case is the first in which this test is mentioned, I will assume that this (possible) infringement of the right to deduct VAT, being a fundamental principle underlying the common system of VAT, should be interpreted strictly, as should all exceptions to general VAT principles.[691] Therefore, I will assume that this rule only applies to situations where costs are made for services performed to goods that are owned by a third party which also profits from these services.

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688 CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683, paragraphs 34 and 35.

689 CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683, paragraphs 38 and 39.

690 CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683, paragraphs 34 and 35.

691 See, for example, CJEU cases C-699/15, Commissioners for Her Majesty's Revenue & Customs v Brockenhurst College, ECLI:EU:C:2017:344, paragraph 23 and C-432/15, Odvolací finanční ředitelství v Pavlína Baštová, ECLI:EU:C:2016:855, paragrapg 59.

6.3.2.4 No recovery of VAT on costs under the 'stand still' provision

Even though the 'main rule' for ensuring the taxation of private consumption is allowing full VAT recovery followed by taxing the private consumption as if it were a supply 'for consideration', Member States are allowed to retain all the exclusions provided for under their national laws at 1 January 1979 (the date that the Sixth VAT Directive came into force) or, in the case of the Member States which acceded to the Union after that date, on the date of their accession.[692] This is (supposed to be) a transitional measure, whereby Member States are allowed to maintain their rules until the Council has determined the expenditure in respect of which VAT shall not be deductible.[693]

In the first half of the eighties of the last century, the Commission submitted two proposals to the Council in which the deduction of VAT on certain specific expenditures was wholly or partially excluded.[694] In these proposals, the VAT on some specific expenditure would no longer be (fully) deductible, because these types of expenditure, even where incurred in connection with the normal operation of a business, nevertheless have the characteristics of final consumption and apportionment of such expenditure between business and private use cannot be accurately verified, and because the nature of such expenditure presents the risk of abuse or tax evasion, not only on the part of resident taxable persons, but also on the part of non-resident taxable persons who are entitled to the refund of tax in a Member State other than that in which they are resident.[695] The specific expenditures included in these proposals, for which the VAT would no longer be (fully) deductible, were:

- the purchase, manufacture, importation, leasing or hire, use, modification, repair or maintenance of passenger cars, pleasure boats, private aircraft and motor cycles,
- supplies (fuels, lubricants, spare parts etc.) for, or services performed in relation to, such vehicles and craft
- transport expenses incurred on business travel by a taxable person or by members of his staff,
- accommodation, food and drink,
- entertainment, including expenditure on hospitality extended to business contacts or, more generally, persons outside the business,
- buildings, parts of buildings or their fittings intended primarily for such entertainment, and

692 Article 176 of the EU VAT Directive.

693 See Article 176 of the EU VAT Directive.

694 Proposal for a Twelfth Council Directive on the harmonization of the laws of the Member States relating to the turnover taxes – Common system of value added tax: expenditure non eligible for deduction of value added tax, COM(82) 870 final, OJ No C 37, 10 February 1983, p. 8, followed by the Amendment to the proposal for a Twelfth Directive relating to the common system of valued added tax: expenditure not eligible for deduction of value added tax, COM(84) 84 final, OJ 1984 C 56, 29 February 1984, p. 7.

695 Proposal for a Twelfth Council Directive on the harmonization of the laws of the Member States relating to the turnover taxes – Common system of value added tax: expenditure non eligible for deduction of value added tax, COM(82) 870 final, OJ No C 37, 10 February 1983, p. 8, 7th and 8th preambles.

- amusements and luxuries.

The proposal was withdrawn in 1996, because the European Council could not come to an agreement on the proposed rules.[696],[697] The proposal was succeeded by a new proposal that was never adopted for the same reasons.[698]

Even though this is not explicitly mentioned anywhere, the proposed rules for not allowing VAT deduction on certain expenditure seem limited to goods and services that are, by their nature, able to be used simultaneously or consecutively for both business and private (non-business) purposes. Examples of simultaneous 'mixed' use are entertainment, business dinners and the use of hotel accommodation during business trips. It can be argued that, since it would be difficult to determine what part of these supplies is actually solely used for business purposes, simplification would help in the way of rules determining that for certain of these costs, VAT cannot be deducted. The same reasoning could be applied to business assets and services that can only be used for either business or private (non-business) purposes as a whole, but never at the same time. Examples of this type of expenditure would be the lease of a company car and mobile phone subscriptions for a periodical fixed fee. At first sight, the proposed rules for disallowing VAT deduction on certain expenditure are not limited to these types of expenditure. For example, a part of a building that is intended primarily for entertainment can be easily separated 'geographically' from the rest of a building. The same applies to a whole building that is intended primarily for entertainment: there is no 'mixed' use. However, in my view, entertainment itself can be qualified as a form of mixed use, since it also serves business purposes. This implies that these rules were aimed at avoiding difficulties with regard to determining the business element in these types of dual-use goods and services. This view is supported by what the Commission has included in the Explanatory Memorandum to the proposal: "(…) In addition, since certain categories of expenditure, even where incurred in connection with the normal operation of a business, often serve private needs too and since apportionment of such expenditure between business and private use cannot be correctly verified, (…)". Such apportionment and verification thereof should not lead to problems in situations where distinct parts of a business asset are always used for business purpose, and other parts are always used for private purposes, e.g. certain rooms or areas in buildings.

Some argue that the provisions regarding non-recovery of VAT (Art. 176 of the EU VAT Directive) and the mechanism where VAT is charged on free transactions that are treated as if they were supplies for consideration (Articles 16 and 26 of the EU VAT Directive) are mutually exclusive, meaning that the former mechanism is meant to apply to expenditure of a 'mixed' nature, where business purposes and private or non-business use both occur, whereas the adjustment that taxes transactions that are

696 See 'Withdrawal of certain proposals and drafts from the Commission', OJ No C 2, 4 January 1997, p 2.

697 K.M. Braun, Aftrek van voorbelasting in de BTW, Kluwer, 2002, p. 253.

698 Proposal for a Council Directive amending Directive 77/388/EEC as regards the rules governing the right to deduct Value Added Tax, COM/98/0377 final, OJ C 219, 15.7.1998, p. 16.

performed by a taxable person 'for purposes other than those of his business' can only apply to transactions that are 'wholly extraneous to those of the taxable business'.[699]

I disagree: the fact the actual use of business assets 'for purposes other than those of a taxable person's business' shows that certain business assets can, apparently, be used both for business use as well as private use. Nowhere in the wording of the relevant provisions is it suggested that these provisions only apply if that use is 'wholly extraneous to those of the taxable business'. This is also clearly demonstrated in the CJEU case law on the application of the relevant provisions that tax supplies that are treated as if they were performed for consideration. Several of these cases dealt with exactly the activities that were included in the proposals that would arrange for the VAT on expenditure on these activities not to be deductible: the purchase, manufacture, importation, leasing or hire, use, modification, repair or maintenance of passenger cars,[700] as well as the supply of accommodation[701] and food and drink.[702] This demonstrates that these types of activities, which clearly qualify as 'dual use' activities in the sense that they serve both business as well as private purposes, can also qualify as supplies made by a taxable person for purposes other than those of his business. I will now discuss the mechanism where private use or use for purposes other than those of the business is taxed.

Under the current interpretation of the EU VAT rules, the exclusions which Member States may retain pursuant to the relevant provision should have been lawful under the Second Directive, which pre-dated the Sixth Directive. In this respect, the relevant provisions of the Second Directive provided that the Member States could exclude from the deduction system "certain goods and services, in particular those capable of being exclusively or partially used for the private needs of the taxable person or of his staff". This provision did not therefore confer on Member States an unfettered discretion to exclude all, or almost all, goods and services from the right of deduction. This means that the option given to Member States requires those Member States to adequately define the nature or the purpose of the goods and services in respect of

699 See Advocate General Sharpston in her opinion in case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590, paragraph 38, and Advocate General Mengozzi in his opinion in case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2008:769, paragraph 52.

700 See, for example, CJEU cases C-97/90, Hansgeorg Lennartz v Finanzamt München III, ECLI:EU:C:1991:315, C-155/01, Cookies World Vertriebsgesellschaft mbH iL v Finanzlandesdirektion für Tirol, ECLI:EU:C:2003:449, C-258/95, Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt, ECLI:EU:C:1997:491 and C-415/98, Laszlo Bakcsi v Finanzamt Fürstenfeldbruck, ECLI:EU:C:2001:136.

701 See, for example. CJEU cases C-269/00, Wolfgang Seeling v Finanzamt Starnberg, ECLI:EU:C:2003:254, C-434/03, P. Charles and T. S. Charles-Tijmens v Staatssecretaris van Financiën, ECLI:EU:C:2005:463, C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573 and C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254.

702 See, for example. CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711.

which the right to deduct is excluded, in order to ensure that that option is not used to authorise general exclusions from that system.[703]

The most common categories of expenditures for which the deduction of VAT is excluded are: fuel, hiring of means of transport, other expenditure relating to means of transport, road tolls and road user charge, travel expenses, such as taxi fares, public transport fares, accommodation, food, drink and restaurant services, admissions to fairs and exhibitions and expenditure on luxuries, amusements and entertainment.[704]

6.3.3 VAT due on transactions that are deemed to be made for consideration

In this Section, I will examine the EU VAT rules dictating the treatment of transactions that are deemed to be made for consideration. Taxing these transactions ensures that goods and services that are performed for no consideration, for example as promotional activities, do not result in untaxed consumption. At the same time, the EU VAT rules should ensure that for businesses that perform these promotional activities, VAT on the costs incurred for performing these activities is deductible as VAT on business costs.

I will first focus on the rules and case law regarding the application and use for private use of business assets that are capital goods,[705] because the VAT rules regarding the application and use for free for consumptive use of capital goods has been the topic of many CJEU cases, as opposed to the application and use of non-capital assets or of services. Subsequently, I will answer the question whether, in the current EU VAT system, these rules should also apply to non-capital goods and to services (Sections 6.3.3.5 and 6.3.3.6). I will comment on these rules and give my view on how these transactions should be treated from a VAT perspective, using the purpose of EU VAT and the commercial and economic reality of these transactions as a reference.

6.3.3.1 Taxation of the application and the use of capital assets

For the purposes of VAT, ‘application’ shall mean removing the good or goods from the business. They will no longer qualify as business assets, as they are taken from the business as such. This is different from ‘use’, which applies to goods that remain business assets but where these business assets are (also) used for consumptive

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703 CJEU joined cases C-538/08 and C-33/09, X Holding BV v Staatssecretaris van Financiën (C-538/08) and Oracle Nederland BV v Inspecteur van de Belastingdienst Utrecht-Gooi (C-33/09), ECLI:EU:C:2010:192, paragraphs 40-44.

704 See Article 9 of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, OJ L 44 of 20 February 2008 and the first point in the Preamble to Commission Regulation (EC) No 1174/2009 of 30 November 2009 laying down rules for the implementation of articles 34a and 37 of Council Regulation (EC) No 1798/2003 as regards refunds of value added tax under Council Directive 2008/9/EC, OJ L 314/50 of 1 December 2009.

705 Capital goods or capital assets are goods that are intended for continuing use, such as land and machinery. Oxford Dictionary Online, Definition of capital asset in English, © 2019 Oxford University Press, accessed online via https://en.oxforddictionaries.com/definition/capital_asset, last accessed on 27 February 2019.

purposes. Also, I will only focus on the application and use of business assets for no consideration. The rules described in this subsection do not apply to immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person's business and for his private use or that of his staff, or, more generally, for purposes other than those of his business.[706]

The taxation of the application of goods, as laid down in Article 16 of the EU VAT Directive, reads as follows (underlining by me, JB):[707]

> "The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.
>
> However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration."

The taxation of the private use (not application) of goods, as laid down in Article 26 of the EU VAT Directive, reads as follows (underlining by me, JB):[708]

> "Each of the following transactions shall be treated as a supply of services for consideration:
> (a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;
> (b) (...)
>
> Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition."

I will now discuss the EU VAT provisions regarding the private use and application of goods and services more generally, after which I continue to examine the EU VAT treatment of the application and use of capital assets in Section 6.3.3.4.

6.3.3.2 For the private use of the taxable person or of his staff or, more generally, for purposes other than those of the business of the taxable person

By treating the private use of goods that form part of the assets of the business of a taxable person as a supply of services for consideration, the EU VAT Directive aims,

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706 See Article 168a of the EU VAT Directive.

707 Article 16 of the EU VAT Directive.

708 Article 26 of the EU VAT Directive.

first, to ensure equal treatment as between a taxable person, who was able to deduct the VAT on the acquisition or construction of those goods, and a final consumer, by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them, and, second, to ensure fiscal neutrality by ensuring a correspondence between deduction of input VAT and charging of output VAT.[709]

The terms used to describe 'private use' in CJEU case law are the use as an "ordinary consumer who buys goods and pays VAT on them",[710] "acting in a private capacity and not as a taxable person"[711], or as a "final consumer".[712] "Personal benefit" or "personal advantage" is derived from this use or application.[713] The CJEU has also stated that private use is considered "by definition completely different from the business of the taxable person".[714] The CJEU stated this to explain that non-economic activities, as opposed to private use, can perfectly well be considered business transactions.[715] As mentioned in Section 6.3.2.1, in my view, the Union concept of "business activities" (or any other concept) from the EU VAT directive cannot be applied to activities that are outside the scope of that VAT Directive.

Even though the text of Article 16 of the EU VAT Directive mentions the private use or, more generally, for purposes other than those of the business of the taxable person, the 'or' does not mean that these are separate criteria. It is clear from CJEU case law that the private use should be interpreted as an example or species of use for purposes other than those of the business of the taxable person, as is also suggested by the words 'more generally'.[716] This means that private use is only treated as a supply for consideration, and therefore subject to VAT, if the private use serves a purpose other than the purpose of the business. What, then, are 'purposes other than those of the business'?

From CJEU case law, it is clear that this purpose still has to be 'private use', but that it is not confined to the private use by the taxable person himself or that of his staff. In other words, private (or consumptive) use by other parties is also covered by this

709 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph, 54.

710 CJEU case C-20/91, Pieter de Jong v Staatssecretaris van Financiën, ECLI:EU:C:1992:192, paragraph 15.

711 CJEU case C-20/91, Pieter de Jong v Staatssecretaris van Financiën, ECLI:EU:C:1992:192, paragraph 17.

712 CJEU case C-258/95, Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraph 25.

713 CJEU cases C-258/95, Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraph 30 and C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 62.

714 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraph 39.

715 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraph 39.

716 See, for example, CJEU cases C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711 and C-258/95, Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt, ECLI:EU:C:1997:491.

provision. As I mentioned before, these 'purposes' do not include non-economic activities of a business. It has to be 'private use' in the sense as described above.

With regard to the question whether non-economic activities may be considered to be carried out for 'purposes other than' those of the business, the CJEU noted that in other cases, it had stated that non-economic activities do not fall within the scope of the directive, specifying that the deductions scheme relates to all economic activities of a taxable person, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT. It follows that the provisions that treat certain activities as supplies of goods or services for consideration are not intended to establish a rule that transactions outside the scope of the system of VAT may be considered to be carried out for 'purposes other than' those of the business within the meaning of those provisions. Such an interpretation would have the effect of rendering Article 2(1) of the EU VAT Directive meaningless.[717]

The phrase 'for purposes other than those of his business' could be interpreted as meaning that as long as some degree of business purposes are served, the use or application of goods or services should not be taxed. As indicated above, this is not the case. I will explain below, in Section 6.4.1, taxation will only not occur when the element of private consumption is accessory to the business purposes of the use or application of the goods or services for free. The CJEU has repeatedly confirmed that free application or use of goods or services for other than business purposes, where the private use element is not negligible, should be taxed.[718]

6.3.3.3 Disposal free of charge (of goods, not services)

When comparing the two provisions that treat certain 'free' transactions as if they were performed for consideration, it becomes apparent that there are two differences between the provision that covers the application of goods and the provision that treats certain free transactions as services performed for consideration. Focussing on the provision regarding the application of goods, this provision contains a 'transaction' or 'condition of application' that is treated as if performed for consideration that is not included in the provision regarding services. Where services are treated as if performed for consideration if they entail use "for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business" or "services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business", the application of business assets is taxed if a taxable person applies them "for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business". The difference lies in the "or

717 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraphs 35-38.

718 See, as examples, CJEU cases C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraphs 22 and 23 and C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 19.

their disposal free of charge". The question arises whether that disposal free of charge should be interpreted more broadly than the application for purposes other than those of the taxable person's business, especially since that latter concept is preceded by the words "more generally", implying that the disposal free of charge is, therefore, less general.

The CJEU has confirmed that this is, indeed the case. It has held that it is clear from the very wording of the relevant provision that it treats as a supply made for consideration, and therefore as subject to VAT, a taxable person's disposal free of charge of goods forming part of his business assets, where input VAT was deductible on those goods, it being in principle immaterial whether their disposal was for business purposes. The fact that the same provision precludes taxation of applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business would, in the view of the CJEU, make no sense if the first part did not make VAT payable on the disposal free of charge of such goods by the taxable person, even where this is done for business purposes.[719] This interpretation is also supported by the legislative history of the relevant provision,[720] which provided inter alia that applications for the purposes of giving samples or making gifts of small value, eligible for classification as general expenses giving tax relief, were not – contrary to the general rule – to be considered as taxable transactions. It follows that, where the gifts are not of small value, such applications must be treated as taxable supplies, even where made for business purposes.[721]

Should this provision be interpreted so broadly that it includes non-economic activities? In my view, this should not be the case. The same reasoning that precludes non-economic activities from being covered by free use of business assets for purposes other than those of the business of the taxable person should apply here: such an interpretation would have the effect of rendering Article 2(1) of the EU VAT Directive meaningless.[722] However, a case was ruled by the CJEU where a business property was applied, in lieu of payment, for the purpose of discharging a tax debt. In that case, the CJEU decided that any VAT recovered in relation to the property was covered by the provisions of Article 16 of the EU VAT Directive, eliminating any risk of an untaxed final consumption.[723]

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719 See CJEU case C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 22.

720 Point 6 of Annex A to the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16) and Article 5(3)(a) of the Commission's proposal for the Sixth Directive, submitted to the Council on 29 June 1973 (OJ 1973 C 80, p. 1)

721 See CJEU case C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 23.

722 CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraphs 35-38.

723 CJEU case C-36/16, Minister Finansów v Posnania Investment SA, ECLI:EU:C:2017:361, paragraphs 36 and 38.

It seems that the CJEU implies that non-economic use can be subject to VAT under that provision, because in its decision, the CJEU makes an explicit reference to the opinion of the Advocate General, who considered this transaction to be of an non-economic nature.[724] However, in my view, this reference to the opinion can only be aimed at the VAT treatment of the use of the property, i.e. the application of the relevant provision (Article 16), and not to the actual nature of the transaction. The CJEU does not mention anything explicitly about this in its judgment. In my view, discharging a tax debt for which a business is liable should not be considered a non-economic activity, since tax debts often arise as a result of economic activities. Also, if a business were to outsource its tax compliance or procure tax advisory services, under the rationale of the Advocate General, these services might well be related to non-economic activities and therefore the VAT on the costs of these activities should not be recoverable either. This cannot be correct. In my view, such costs have a direct and immediate link with the taxable person's economic activity as a whole.

6.3.3.4 Taxation of the application and the use of capital assets (continued)

Under the current EU VAT rules, VAT incurred on the purchase of capital goods can be deducted if the good is purchased by a taxable person acting as such,[725] where the goods are assigned to his business assets.[726] As mentioned, this does not apply to immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person's business and for his private use or that of his staff, or, more generally, for purposes other than those of his business.[727]

Where capital goods are used both for business and for private purposes the taxpayer has the choice, for the purposes of VAT, of allocating those goods wholly to the assets of his business, retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or integrating them into his business only to the extent to which they are actually used for business purposes.[728]

Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT due on the acquisition of those can

724 Opinion of the Advocate General in case C-36/16, Minister Finansów v Posnania Investment SA, ECLI:EU:C:2017:134, paragraph 44.

725 Article 168.

726 See, for example, CJEU cases C-97/90, Hansgeorg Lennartz v Finanzamt München III, ECLI:EU:C:1991:315, paragraph 26 and Joined cases C-322/99 and C-323/99, Finanzamt Burgdorf v Hans-Georg Fischer and Finanzamt Düsseldorf-Mettmann v Klaus Brandenstein, ECLI:EU:C:2001:280.

727 See Article 168a of the EU VAT Directive.

728 CJEU cases C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 39, C-434/03, P. Charles and T. S. Charles-Tijmens v Staatssecretaris van Financiën, ECLI:EU:C:2005:463, paragraph 23 and case-law cited, and C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573, paragraph 21.

be deducted immediately and in full insofar as the goods are used for non-exempt business activities, not taking into account the private use as taxable activities.[729,730]

However, it follows from Article 75 of the EU VAT Directive that when the input VAT paid on goods forming part of the assets of a business is wholly or partly deductible, their use for the private purposes of the taxable person or of his staff or for purposes other than those of his business is treated as a supply of services for consideration. That use, which is therefore a 'taxable transaction' within the meaning of that directive, is taxed on the basis of the cost of providing the services.[731]

Subsequent use for business purposes of the part of the goods allocated to private assets is not capable of giving rise to a right to deduct, because the relevant provision in the EU VAT Directive lays down that the right to deduct is to arise at the time when the deductible tax becomes chargeable. There is no adjustment mechanism to that effect under Union legislation as it stands.[732]

Taxable persons who carry out only exempt transactions can generally not deduct any input tax and also, therefore, cannot claim deductions concerning the use for private purposes of mixed-use goods.[733] Equally, with regard to taxable persons carrying out both exempt transactions and taxable transactions, there is no conflict between the proportions of private and business use and the proportionate deduction provided for under the EU VAT Directive.[734]

By treating the private use of goods that form part of the assets of the business of a taxable person as a supply of services for consideration, the EU VAT Directive aims, first, to ensure equal treatment as between a taxable person, who was able to deduct the VAT on the acquisition or construction of those goods, and a final consumer, by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them, and, second, to ensure fiscal neutrality by ensuring a correspondence between deduction of input VAT and charging of output VAT.[735]

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729 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 40.

730 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraphs 49-51.

731 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 41.

732 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 44.

733 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 49.

734 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph 50.

735 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph, 54.

This means that, under the current EU VAT rules, the VAT incurred on the purchase of capital goods that are purchased by a taxable person which he has 'labelled' as business assets and that will be used for his business activities as well as for private consumption purposes, is fully deductible, unless the taxable person also uses the capital goods for exempt business activities of for non-economic activities. The subsequent consumption (private use) is subject to VAT.

Not all situations where a capital business asset is applied or used for consumptive purposes, however, is treated as a supply for consideration. I will elaborate on this below, in Section 6.4.

In most of the CJEU case law about this specific issue, the taxable person either applies or uses a capital business asset for private consumption purposes. This raises the question whether the same VAT rules, i.e. full VAT deduction followed by taxation of the private consumption, also applies to non-capital goods and to services.

6.3.3.5 Do the 'private use allows full VAT deduction and subsequent taxation of that private use'-provisions also apply to non-capital goods?

It could be argued that the rules as described above shouldn't apply to goods and services that are consumed immediately, because that would unnecessarily complicate matters, for example in a situation where VAT on the purchase price of a good is deducted in a specific taxable period, where the use or application of that same good may have to be taxed in the same taxable period.[736] In my view, the rules should also apply to non-capital goods.

The right of deduction as laid down in the EU VAT Directive, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT and in principle may not be limited.[737] I see no reason to limit the system of deduction of VAT as described above to capital goods. These rules should apply to all situations where any type of goods (or services) are acquired the use of which cannot be (fully) determined at the time of the purchase (or at the time that the VAT on incurred on those goods or services is deductible). In my view, the proper way[738] to ensure that the actual private use of those goods is taxed is by first allowing full deduction and to subsequently adjust that deduction for the private use of the goods, e.g. by taxing the

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736 See, for example, the comment by B.G. van Zadelhoff to the ruling of the Dutch Supreme Court in case 42415 of 2 November 2007 as published in BNB 2008/53, Kluwer, the Netherlands.

737 See CJEU joined cases C-538/08 and C-33/09, X Holding BV v Staatssecretaris van Financiën (C-538/08) and Oracle Nederland BV v Inspecteur van de Belastingdienst Utrecht-Gooi (C-33/09), ECLI:EU:C:2010:192, par. 37 and the case law cited there.

738 Based on the fundamental principle underlying the common system of VAT which is the right to deduct VAT, as an integral part of the VAT scheme, which in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on input transactions. See, for example, CJEU case C-74/08, PARAT Automotive Cabrio Textiltetőket Gyártó Kft. v Adó- és Pénzügyi Ellenőrzési Hivatal, Hatósági Főosztály, Észak-magyarországi Kihelyezett Hatósági Osztály, ECLI:EU:C:2009:261, paragraph 15 and the case law cited there.

private use. Therefore, the above rules should apply to any goods (or services) for which the actual proportion of business and private use cannot be determined upfront.

My view that the provisions entailing (full) deduction followed by the taxation of private use also apply to non-capital goods is supported by the fact that, under the EU VAT rules, the relevant provision does not mention 'capital goods' or a similar concept, but simply mentions 'goods forming part of the assets of a business'. Assets of a business are the goods and intangibles it owns that have a specific value.[739]

Furthermore, according to the CJEU, the purpose of the provisions regarding taxation of private use is to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type.[740] The CJEU clearly refers to goods and services that can be purchased by final consumers, which means that the provision does not only apply to capital goods. According to the Explanatory Memorandum to the relevant provision in the Sixth EU VAT Directive, the aim achieved by the relevant provision could have been attained by means of adjustments to deductions already made, but the technique of treating these transactions as taxable supplies was chosen for reasons of impartiality and simplicity.[741] This reasoning is not confined to capital goods but can also be applied to other goods (and to services).

Also, under the same provision, the application of goods as samples and as gifts of small value are explicitly excluded from the treatment as a supply for consideration. To me, this is a clear indication that without this specific exclusion, the application of those samples and gifts of small value would be taxed. Samples and gifts of small value are usually not capital goods.

Moreover, sufficient CJEU case law exists about the application of the relevant provision to non-capital goods in which the described VAT consequences are indeed deemed applicable, such as copies of vinyl records, cassette tapes and compact discs as well as the supply of food and drinks during meetings.[742] Therefore, the rules regarding initial full VAT deduction followed by taxation of consumption also apply to non-capital goods.

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739 Oxford Dictionary Online, Definition of asset in English, © 2019 Oxford University Press, accessed online via https://en.oxforddictionaries.com/definition/asset, last accessed on 27 February 2019.

740 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590, paragraph 46 and the CJEU case law cited there.

741 Proposal for a sixth Council Directive on the harmonization of Member States concerning turnover taxes, Common system of value added tax: Uniform basis of assessment, COM9730 950, 20 june 1973, Bulletin of the European Communities, Supplement 11/73, page 10.

742 See, for example, CJEU cases C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203 (gifts to purchasers of fuel), C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559 (distributing free copies of vinyl records, cassette tapes and compact discs) and Case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590 (the supply of food and drinks during meetings).

Having established that the above rules regarding deduction and subsequent taxation of private use should also apply to non-capital goods, I would argue that the rules should be applied to all goods and not only to goods that can be used over a longer period of time during which the proportion of business versus private use can change over time. As an example, a shopkeeper that purchases 100 packets of treacle waffles biscuits to sell in his shop can deduct all VAT incurred on this purchase. When he takes one of the packets home for private consumption, this will be taxed under the relevant provisions.[743]

6.3.3.6 Taxation of the 'private use' of services.

For taxation of the private use of services, not being the use of business assets, the relevant provision reads as follows (underlining by me, JB):

> "Each of the following transactions shall be treated as a supply of services for consideration:
> (a) (...);
> (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.
> Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition."

In my view the system of (in principle: full) VAT deduction followed by taxation of the private use also applies to services. This view is mainly based on the same grounds as I used above for arguing that these rules apply to any type of goods. Services for which it is impossible to establish the amount or extend of the private use at the time that the VAT on the purchase of these services can be deducted, should be treated the same way as the goods described above. As an example, I take a company lease car. A company leases cars under an operational lease scheme (which is considered a service similar to hiring the cars) and puts the cars at the disposal of some of its employees free of charge. These employees are allowed to use the car for private purposes. The actual private use can only properly[744] be taxed under a system of full deduction followed by an adjustment of that deduction for private use, either by taxing the private use or by retroactively disallowing (adjusting) the deduction. The first adjustment system is, in my view, covered by the relevant provision in the EU VAT Directive. The current EU VAT rules do not provide for the application of the second system in case of private use.

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743 Unless it qualifies as a gift of small value, see Article 16 of the EU VAT Directive.

744 Based on the fundamental principle underlying the common system of VAT which is the right to deduct VAT, as an integral part of the VAT scheme, which in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on input transactions. See, for example, CJEU case C-74/08, PARAT Automotive Cabrio Textiltetőket Gyártó Kft. v Adó- és Pénzügyi Ellenőrzési Hivatal, Hatósági Főosztály, Észak-magyarországi Kihelyezett Hatósági Osztály, ECLI:EU:C:2009:261, paragraph 15 and the case law cited there.

The adjustment provision for services not being the use of business assets does not contain the rule that it only applies 'where VAT (…) was wholly or partly deductible', which is included in the provisions regarding the application or use of business goods. I was unable to find an explanation of the absence of this condition in any of the official documents concerning the proposals for any of the EU VAT directives or adjustments thereof. In my view, however, the absence of this requirement is not an indication that the provision should not apply to bought-in services (as some people think, see below), but rather that the aim or goal of the provision is more than only an adjustment of the VAT that was previously deducted. The aim is, rather, to ensure equal treatment as between a taxable person, who was able to deduct the VAT on the acquisition or construction of those goods, and a final consumer, by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them.[745]

The relevant provision refers principally to services supplied by staff, and staff costs (in the form of salary) do not bear VAT. However, where a single, composite supply should be classified as a supply a service, the goods used will normally have been subject to VAT. And the taxable amount, for all supplies referred to in the relevant provision, is 'the full cost to the taxable person of providing those services'.[746]

An example derived from the opinion of Advocate General to the CJEU Sharpston in the Danfoss and AstraZeneca-case[747] would be the extension of the home of a building contractor's home, using some of his employees and materials from his stockyard. Input VAT will already have been deducted on the materials used, but output tax must now be levied on that same cost, together with the cost of providing the labour, in order to place the contractor in (almost) the same position, vis-à-vis VAT, as a private individual obtaining the same goods and services. However, if the VAT on the materials would not have been deducted, e.g. because they were sourced from a private individual, VAT should be levied on these materials as part of the service as well, because if the contractor would have purchased exactly the same service, consisting of exactly the same components, VAT would have been due on the entire supply (including all its components) as well.

Not everyone agrees with that latter view. According to Advocate General Sharpston in the Danfoss and AstraZeneca-case, [748] including the cost of supplies on which input tax was not deductible in the taxable amount would run counter not only to the scheme of Articles 16 and 26 of the EU VAT Directive as a whole but also to the fundamental

745 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph, 54.

746 Article 11A(1)(c) of the EU VAT Directive.

747 Opinion of Advocate General Sharpston in case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590.

748 Opinion of Advocate General Sharpston in case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590, paragraphs 41-43.

principle of neutrality of VAT for taxable persons. Consequently, taxation under Article 16 or 26 of the Sixth Directive is conditional not only on classifying the supply as an application for private use, but also on the deductibility of any VAT borne by cost components. Therefore, according to Sharpston, any components that bear non-deducted VAT should not be taxed as a result of these provisions (insofar as the VAT was not deducted). As mentioned, I disagree. The purpose of the relevant provisions is to ensure equal treatment of this business and a private consumer that would have to purchase the same service from a third party. A third party would also have charged VAT on the components that he purchased without being able to deduct VAT.[749] This would be different if the taxable person would first withdraw the goods from his business, because that would remain untaxed, and then would use those non-business assets as elements in the total supply.[750]

Below I have included an example of supplies of goods and a supply of services provided without consideration for private purposes. With these examples I demonstrate that, from a point of fiscal neutrality,[751] taxing the 'elements' of a total supply on which no VAT was deducted may lead to (slightly) unequal situations.

Example 1: supply of services.
The owner of an Indonesian restaurant decides that, for his birthday, he will close his restaurant for one evening and invite friends and family to enjoy an evening of elaborate Indonesian cuisine. Preparation time by his kitchen staff of four is 32 hours. His serving staff of two works for a total of 12 hours that evening. The VAT incurred on all of the ingredients was deducted upon purchase.

Under the current EU VAT rules, the above is considered a supply of a service made for consideration, and therefore subject to VAT.[752,753] The taxable amount for this service is 'the full cost to the taxable person of providing the services'.[754] In my view, under those rules, the 'full cost' includes the 44 hours worked by his staff, even though no VAT was incurred or deducted on this element of the 'full cost'.

Example 2: supply of goods.
The owner of an Indonesian restaurant decides to celebrate his birthday at his private home and to invite friends and family to enjoy an evening of elaborate

749 See CJEU case C-415/98, Laszlo Bakcsi v Finanzamt Fürstenfeldbruck, ECLI:EU:C:2001:136, paragraph 47.

750 See CJEU case C-415/98, Laszlo Bakcsi v Finanzamt Fürstenfeldbruck, ECLI:EU:C:2001:136, paragraph 47.

751 In the sense that similar transactions should be treated the same from a VAT perspective.

752 Article 26 of the EU VAT Directive.

753 The activities qualify as 'restaurant services' as in Article 6 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L 77, 23 March 2011, p. 4.

754 Article 75 of the EU VAT Directive.

Indonesian cuisine. Preparation time by his kitchen staff of four is 32 hours. The food is transferred to dishes and other containers owned by the restaurant owner. He transports the food to his house and puts it on tables in his house. The food is kept warm on 'hot trays' (owned by himself privately), presented as a buffet. There is no serving staff present: he and his guests will have to take the food themselves. The VAT incurred on all of the ingredients was deducted upon purchase.

Under the current EU VAT rules, the above is considered a supply of goods for consideration that is subject to VAT, 'where the VAT on those goods or the component parts thereof was wholly or partly deductible'.[755,756] The taxable amount for this supply is 'the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place'.[757] In my view, this does not include the 32 hours worked by the kitchen staff. This is the main difference with the result in the first example.

The above demonstrates that the purpose of the provisions that treat certain supplies that are made for free as supplies that are made for consideration, which is equal treatment of a taxable person making free private use of supplies by his business, and the same supplies purchased by a private individual. Ensuring an even more equal treatment would require a change in the EU VAT rules, for example by using the 'open market value' as the taxable amount for the transactions that are deemed to be made for consideration. Assuming that a private individual would also pay the open market value, this would ensure equal treatment. Be that as it may, and keeping in mind that, according to the CJEU, the mentioned 'equal treatment' is the purpose of the relevant provisions, it should also be borne in mind that in the explanatory notes to these provisions it was mentioned that 'the same could have been achieved by disallowing VAT deduction'.[758]

This raises questions about the purpose of the relevant provisions. In my view, given the fact that the EU VAT is a taxation of expenditure for private consumption, and given the fact that the CJEU has repeatedly decided that these provisions are intended to ensure treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or

755 Article 16 of the EU VAT Directive.

756 The activities do not qualify as 'restaurant services' as in Article 6 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L 77, 23 March 2011, p. 4, because "The supply of prepared (…) food (…), whether or not including transport but without any other support services, shall not be considered restaurant or catering services (…)".

757 Article 75 of the EU VAT Directive.

758 Proposal for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950 of 20 June 1973, Bulletin of the European Communities 1973, Supplement 11/73, OJ C 80, 5 October 1973, p. 10.

services of the same type,[759] which is a reflection of the principle of neutrality, I would argue that the provisions should also ensure the taxation of elements that would have been subject to VAT if purchased as a private individual.

6.3.3.7 Do the 'private use' provisions also apply to bought-in (purchased) services?

Some EU Member States, e.g. Germany,[760] are of the view that the 'full-deduction-followed-by-adjustment' rules do not apply to purchased services. Other Member States, like the United Kingdom,[761] only allow the rule for services where the private use cannot be assessed beforehand, and yet other Member States, like the Netherlands,[762] are unsure.

In my view, there is no reason not to include bought-in services in this adjustment system, if only because there is nothing in the text of the provision that suggests that they should not be included. Both Merkx[763] and Terra and Kajus[764] share this view, based on the same CJEU case law that I will describe in this Section to support this view.

In its case law regarding this provision, i.e. the Fillibeck case,[765] the Cookies World case[766] and the Danfoss and AstraZeneca case,[767] the CJEU has stated that the aim of this provision is to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer

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759 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 46 and the CJEU case law cited there.

760 Schreiben betr. Vorsteurabzug und Umsatzbesteuerung bei unternehmerisch genutzten Fahrzeuge ab 1. April 1999, BMF 27.8.2004 IV B 7-S 7300-70/04, Section 5 (Miete oder Leasing von Fahrzeugen). The German Ministry of Finance explains that the VAT on the rent and the lease terms cannot be deducted insofar as the vehicles are used for private purposes. However, the Ministry of Finance allows businesses, for simplicity reasons, to apply the VAT rules applicable to goods.

761 I found this on-line in an official HMRC publication regarding Private use of goods or services, self-supply and VAT, last updated on 18 June 2018, on http://www.hmrc.gov.uk/vat/managing/special-situations/private-use.htm, under the heading 'Accounting for VAT on services used privately', last visited on 18 February 2019.

762 Explanatory Memorandum to the 2007 Tax Package (Belastingplan 2007), Tweede Kamer, vergaderjaar 2006-2007, 30 804, nr. 3, page 60 (not applicable to purchased services) and 63-65 (VAT on such purchased services is deductible because the services are subject to VAT).

763 Madeleine Merkx, 'VAT on Private Use of Company Cars in Cross-Border Situations: Double on Non-taxation?' (2015) 24 EC Tax Review, Issue 2, pp. 96-104.

764 Ben Terra and Julie Kajus, A Guide to the European VAT Directives 2018, IBFD, Amsterdam, 2018, Volume 1, Section 4.11.3.7.

765 CJEU case C-258/95 Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustad, ECLI:EU:C:1997:491.

766 CJEU case C-155/01, Cookies World Vertriebsgesellschaft mbH iL and Finanzlandesdirektion für Tirol, ECLI:EU:C:2003:449.

767 CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590.

who acquires goods or services of the same type.[768] To me, this is a clear indication that the CJEU supports my view that these provisions also apply to bought-in services.

Also, the same taxable amount is used for both provisions that regard services for no consideration as being made for consideration: the use of goods as well as the use of services. For the use of the goods, the provision only applies insofar VAT was deducted. The fact that the same taxable amount is used for both provisions to me is an indication that the provisions serve the same purpose: ensuring that the taxable person using services for his private purposes is treated the same as a private consumer of those services, from a VAT perspective. This goal is achieved by an adjustment system that not only ensures taxation to balance out prior deduction of VAT in case of private consumption, but also taxation of services that would have been subject to VAT if purchased from a third-party provider.

Furthermore, CJEU case law exists about the taxation of the private consumption of bought-in services: transportation of staff arranged by other parties than the employer,[769] company lease cars[770] and the supply of catering services.[771] However, the CJEU has also ruled that where work (i.e. services, JB) which is carried out on goods after their purchase and on which the input VAT was deducted does not give rise to liability of VAT under the 'adjustment for private consumption through taxation'-provision regarding the application of goods, the VAT deducted in respect of that work must be adjusted in accordance with the (other) 'adjustment provisions'[772] (under which overclaimed VAT must be repaid as such) if the value of the work in question has not been entirely consumed in the context of the business activity of the taxable person before the goods is allocated for private consumption purposes.[773] In my view, this is not in line with the purpose of the relevant provisions and also only appears in one CJEU ruling about the application or use of goods.

6.3.3.8 The recipient's VAT status and his use of the free supply

The aim of the provisions regarding the taxation of the application or use of goods or services for private consumption purposes is to ensure equal treatment as between a

768 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 46 and the CJEU case law cited there.

769 CJEU case C-258/95 Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustad, ECLI:EU:C:1997:491, answer to the third preliminary question (question: "Does Article 6(2) of Directive 77/338/EEC also cover a case where the employer does not convey the employees in its own vehicles, but commissions a third party (…) to effect the transport?" answer: "The answer to the second question also applies when the employer does not convey the employees in its own vehicles, but commissions one of its employees to provide the transport using his own private vehicle".

770 CJEU case C-155/01, Cookies World Vertriebsgesellschaft mbH iL and Finanzlandesdirektion für Tirol, ECLI:EU:C:2003:449.

771 CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590.

772 Articles 184-192 of the EU VAT Directive.

773 CJEU joined cases C-322/99 and C-323/99, Finanzamt Burgdorf and Hans-Georg Fischer (C-322/99) and Finanzamt Düsseldorf-Mettmann and Klaus Brandenstein (C-323/99), ECLI:EU:C:2001:280, paragraph 95.

taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type.[774]

Under this rationale, in my view, it does not make sense to tax the free supply of goods or services to businesses that would be able to fully recover the VAT on these supplies and that would not have to pay VAT on the deemed application or use for private purposes, if these goods or services had been supplied directly to them. In other words, if a business receiving free goods or services would not need to adjust the VAT[775] on the costs of those goods or services if he had incurred those costs directly, there is, in my view, no private consumption; otherwise, an adjustment would be required. For example, if a construction company purchases a new work of art (e.g. a statue) and presents this as a gift to a fully taxable business for which they just finished the construction of a new office building, and where they know that this business may purchase more real estate in the future, taxing this present does not, in my view, achieve the goal of ensuring equal treatment as described above, because the business that purchased the new office building would have been able to recover the VAT on the statue without having to make any adjustments if it would have purchased that statue directly from the artist.

Some taxpayers have identified this issue – the fact that providing free gifts to a fully taxable business may lead to taxation, even where that business could have deducted the VAT on the costs of those gifts if purchased directly – as well. However, the CJEU, when asked its view on this issue, held that "(…) it is apparent from that provision that it does not draw any distinction on the basis of the tax status of the recipient of samples (…)".[776]

As mentioned before, in my view, the application of the relevant adjustment rules in situations where the recipient of the supply could have deducted the VAT on the supply does not seem in line with the purpose of the provision, i.e. to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type, if only because in this case the recipient is not (or does not act in the capacity of) a final consumer. Taxing this supply (the supply by the construction company to its customer) leads to unjust enrichment of the tax authorities: there should be no VAT burden on this transaction. Unfortunately, as with the provisions regarding the taxation of the private use of services, the wording of the relevant provision is sufficiently clear,[777] precise and unconditional and therefore, under this

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774 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590, paragraph 46 and the CJEU case law cited there.

775 By way of taxation of a deemed taxable supply for consideration based on Articles 16 or 26 of the EU VAT Directive.

776 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 52.

777 Or at least it is to the CJEU, which is apparent from the fact that "(…) that provision (…) does not draw any distinction on the basis of the tax status of the recipient of samples (…)" (CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 52).

provision, this type of supplies for no consideration will be subject to tax. As I said earlier about the provisions regarding the taxation of the private use of services, I would strongly suggest changing the wording of this provision to make it more in line with what is, in my view, its purpose. Not taxing these transactions would, in my view, also better reflect economic and commercial reality (as a species of neutrality) in the sense that VAT should not be a burden in a commercial chain of transactions where all businesses in that chain have the right to deduct VAT.

6.4 Exceptions to the main rule: consumption without adjustment(?)

Before I investigate whether the relevant provisions in the EU VAT Directive that deal with the VAT treatment of transactions that are subject to VAT also apply to supplies that are deemed to be made for consideration, I will examine the exceptions to the rules that require taxation of these supplies. In some cases, where the personal benefit derived from a free supply is of only secondary importance compared to the needs of the business[778] or merely accessory to the requirements of the business,[779] the supplies should not be taxed, even though there is an element of private consumption.

From the beginning, it was clear that certain free supplies should not be taxed, even though these would lead to (a certain degree of (private)) consumption. This has been codified for the supply of free gifts and samples[780] and is based on CJEU case law for other supplies that are free of charge and that are not considered to be made for purposes other than those of the business, even though some degree of (private) consumption takes place.[781]

According to the CJEU, the fact that there is a valid business reason for making free supplies is not sufficient to avoid taxation.[782] This means that there is a difference in VAT treatment of goods and services provided free of charge for business purposes where an element of consumption is still acknowledged and supplies goods and services for no consideration where the personal benefit that is a result of that supply is considered of only secondary importance compared to the needs of the business[783]

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778 CJEU case C-285/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraph 30.

779 CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 62.

780 Proposal for a second Directive for the harmonization among Member States of turnover tax legislation, concerning the form and methods of application of the common system of taxation on value added, COM (65) 144 final, 13 April 1965, Supplement to the Bulletin of the European Economic Community No. 5, 1965, p. 32: "Withdrawals for publicity gifts of small value and for samples, which may be imputed to overhead costs for fiscal purposes, should not be treated as taxable deliveries."

781 See, for example, CJEU Case C-285/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491, par. 30 and Case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, par. 60-63.

782 CJEU case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, par. 22 and 23.

783 CJEU case C-285/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491, par. 30.

or merely accessory to the requirements of the business.[784] The first type of supply is taxed, the second type is not.

6.4.1 The element of private consumption can be so small, compared to the business reasons for making the free supply, that no adjustment needs to be made

When goods or services are used or supplied free of charge by a business without any private consumption occurring, there is in principle no need to tax the supply or make an adjustment of the VAT deducted on the costs of making the free supply (of goods or services). This can be different if, for example, goods are initially purchased by a taxable part of a business that deducts all VAT on the purchase of the goods and where the goods are subsequently transferred to a VAT exempt part of the business that would not have been able to deduct the VAT if it had purchased those goods itself. This situation is foreseen by the EU legislator and under the current EU VAT rules, EU Member States may tax the application of goods by a taxable person for the purposes of a non-taxable area of activity, where the VAT on such goods became wholly or partly deductible[785] and the supply of a service for the purposes of his business, where the VAT on such a service, were it supplied by another taxable person, would not be wholly deductible.[786] However, this taxation system falls outside the scope of this research because it is unrelated to promotional activities.

Under the current EU VAT rules, the initial deduction of VAT shall be adjusted where it is higher or lower than that to which the taxable person was entitled, e.g. because the goods were purchased for business use but are applied for private consumption.[787] Provisions have been included in the EU VAT Directive to avoid this adjustment in the case of goods reserved for the purpose of making gifts of small value or of giving samples.[788] Even though this is not explicitly included in that provision, in my view, the same should apply (i.e. no adjustment should be made) when the goods or services are supplied free of charge for business purposes. In cases where the element of personal consumption/personal advantage derived from a supply that is made free of charge, is merely accessory to the requirements of the business for making that supply, the 'consumption-element' follows the VAT treatment of the free business supply, which should be considered to be made for no other purposes than those of the business. In those cases, no adjustment of deducted VAT should be required, because the costs on which the VAT was incurred are (still) considered to be made only for business

784 CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, par. 62.

785 See Article 18(b) of the EU VAT Directive.

786 See Article 27 of the EU VAT Directive. As with the taxation of the 'private use' of services, the applicability of this provision does not depend on whether input VAT was deducted on the costs. For similar reasons as the ones I used for arguing that the 'private use of services' provision also applies to bought-in services, I argue that this provision also applies to the 'transfer for free' of bought-in services, e.g. the use of IT-services, licenses etc.

787 See Article 184 of the EU VAT Directive.

788 See Article 185(2) of the EU VAT Directive.

purposes.[789] In other words, where the personal benefit or consumption that is a result of a free supply is considered of only secondary importance compared to the needs of the business, no taxation (or other adjustment) should occur.[790] Where VAT was only partially deducted due to the fact that the business performs activities that are exempt without credit and the purchases were considered 'overhead', the adjustment through taxation only needs to be made insofar as VAT was deducted.

According to the dictionary, 'accessory' means 'contributing to or aiding an activity or process in a minor way'.[791] Whether or not the 'private consumption'-element of a free supply can be considered accessory to the business purposes of the supply may depend, inter alia, on the particular characteristics of the supply, the specific requirements of the business and the manner in which the business is organised.[792]

In my view, the above implies that when a free supply is considered to be made for business purposes only, because the element of private consumption can be ignored, there is no reason to apply the provisions in the EU VAT rules concerning a VAT adjustment as a result of changes in the factors used to determine the amount that was initially deducted[793] either.

6.4.2 No taxation of the free supply of samples and of gifts of small value

The supply free of charge of samples and of gifts of small value is not taxed. In my view, the explanatory notes regarding the EU VAT rules don't really clarify why this appropriation for giving gifts of small value and samples shall not be considered as taxable supply when they may be classified as overhead expenses from a tax point of view.[794] From the fact that only 'overhead expenses' qualify, it seems to me that this should be considered a practical simplification, because under this simplification businesses won't have to assess or determine the (extent of the) use or application for private consumption of these supplies.

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789 This is confirmed by the CJEU in case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 62.

790 CJEU case C-285/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraph 30.

791 Oxford Dictionaries, accessed on-line at http://www.oxforddictionaries.com/definition/english/accessory on 1 October 2014.

792 CJEU cases C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraphs 63 and 64 and C-285/95, Julius Fillibeck Söhne GmbH&Co. KG and Finanzamt Neustadt, ECLI:EU:C:1997:491, paragraph 29.

793 Article 185 of the EU VAT Directive.

794 Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967(I), p. 16), Annex A, under "6. Regarding Article 5(3)(a)".

According to Advocate General to the Court of Justice of the European Union Jääskinen in the EMI case,[795] the purpose of excluding the supply of samples and gifts of small value from taxation must be to reflect the commercial reality that samples and gifts of small value may be necessary in order to promote a business and its products. In his view, there can be no other reason why the legislature would have sought to exclude them from the scope of the fundamental VAT rule according to which the consumption of goods by final consumers is subject to VAT.

Jääskinen argues in relation to samples that their primary purpose is not to satisfy a need of a final consumer, but to lead to an increase in transactions of the taxable person in question.[796] In my view, it is clear from the relevant CJEU case law that it is not so much the 'primary purpose' of the supply that determines whether or not it should be taxed, but the extent of the use or application for private consumption of the supply. Maybe it can be argued that if the 'primary purpose' of a supply is business related, then the extent of the use or application for private consumption must be considered merely accessory to that or of secondary importance. In that case, Jääskinen's opinion confirms what I wrote earlier.

As regards 'applications for the making of gifts of small value' given for business purposes, the legislature has in his view consciously decided to tolerate that they enter into final consumption without VAT being accounted for. However, he provides no reason for this conscious decision. Even though Jääskinen argues that the commercial reality is that gifts of small value may be necessary in order to promote a business and its products, I don't see why that would only apply to gifts that have a small value. In my view, this is a purely practical simplification measure.

6.4.3 What is a 'sample'

Under the current EU VAT rules, the supply of goods that are samples is explicitly excluded from taxation or adjustment of the deducted VAT.[797] In the dictionary, a sample is defined as "a small part or quantity intended to show what the whole is like" or, more specifically, as "a small amount of a food or other commodity, especially one given to a prospective customer".[798] This implies that samples always represent goods and/or services that can be purchased from the business on whose behalf the samples are distributed. The CJEU confirms this by deciding that "in order to allow (…) goods to be assessed as 'samples', those goods must have all the essential qualities of the product which they represent, in its final form".[799]

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795 Opinion of Advocate General Jääskinen in CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:194, paragraph 30.

796 Opinion of Advocate General Jääskinen in CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:194, paragraph 30.

797 Articles 16 and 185(2) of the EU VAT Directive.

798 Oxford Dictionaries, accessed on-line at http://www.oxforddictionaries.com/definition/english/sample on 28 February 2019.

799 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 28.

According to the CJEU, the distribution of samples is carried out in order to promote the product of which the samples are specimens, by allowing for the quality of that product to be assessed and for verification that the product has the qualities sought by a potential or actual buyer.[800] Therefore, it may not be relevant whether samples are actually supplied for free to the potential or actual buyers of the product or to others, as long as the above objective is still pursued.[801] This means that as long as the supply of samples free of charge serves the purpose of promoting the sales of the 'underlying' product it represents by enabling potential and actual buyers to assess the quality of that product or to verify that the product has the qualities they seek, the supply of these samples should not be taxed.

Because of the nature of samples, an element of personal or private consumption is often unavoidable. Due to the fact that the making available of specimens which correspond to the product represented in its final form is a necessary prerequisite for the process of assessment of these products, the supply of these samples is not taxed as a non-business application of the goods.[802]

Under this same rationale, the supply of more than one sample, or even the supply of a large number of samples, can still serve that purpose. An example could be the supply of a large number of copies of a music CD to a 'plugger' or to intermediaries.[803] This depends, inter alia, on the nature of the product represented and on the use to which the recipients must put to the samples.[804]

6.4.4 What is a 'gift of small value'

By its very meaning, the concept 'small' can only be applied in relation to other quantities. In the dictionary, small is defined as 'insignificant' or 'unimportant'.[805] Again, these concepts can only be used in relation or comparison to other concepts (which are more significant or more important).

When the EU VAT Directive (or any of its predecessors) does not contain explicit guidance for defining uniformly and precisely the requirements which must be satisfied for a gift to be considered 'of small value', Member States have a certain margin of

800 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 22.

801 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 30.

802 This is supported by the CJEU in case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 27.

803 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraphs 32-38.

804 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 33.

805 Oxford Dictionaries, accessed on-line at http://www.oxforddictionaries.com/definition/english/small on 1 October 2014.

discretion as regards those requirements, provided that they do not fail to have regard to the aims and role of the provision at issue within the scheme of the Directive.[806]

In this respect, the CJEU has ruled that Member States are allowed to fix a monetary ceiling for gifts made to the same person in the course of a specific period of time or as forming part of a series or succession of gifts.[807] This is different from the supply of samples because, in my view, excluding the supply of 'gifts of small value' is a purely practical simplification whereas excluding the supply of free samples from taxation is based on the specific economic reality underlying the supply of samples, i.e. a necessary prerequisite for assessing the quality of the product represented.

According to the CJEU, Member States are not allowed to treat gifts by a business to different recipients as being gifts made to the same person, e.g. their employer. This would deprive the relevant provision of its effectiveness, especially where Member States have established a monetary ceiling for all gifts made to the same person in the course of a fixed period. Classifying the supply of free goods as 'gifts of small value' depends on the fact of knowing who is the distributor's intended final recipient. The relationship between recipients has no effect on that classification.[808]

6.4.5 VAT treatment of free services that are samples or of small value

The relevant provision in the EU VAT Directive regarding the taxation of services that are supplied free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business does not include a specific exception to this rule for the supply of services that qualify as samples or services that are of small value.[809]

As explained above, contrary to the provision regarding the application of goods, which contains an exception for samples and gifts of low value, the provisions regarding services only apply where the free services are used for purposes other than those of the business of the taxable person. It should be clear from the above that free samples should always qualify as being provided for the purpose of the business of the taxable person.

With regard to the supply of free services that can be qualified as gifts of small value (and that are provided free of charge for other purposes than those of the business), I

806 See, to that effect, CJEU case C-51/76, Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen, ECLI:EU:C:1977:12, paragraphs 16-17 and CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 42.

807 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraph 45.

808 CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559, paragraphs 47-49.

809 See Article 26 of the EU VAT Directive.

do not see why these should be treated differently from goods. There is no rational explanation for this difference. I would therefore strongly argue for an adjustment to the relevant provision, ensuring that services that qualify as gifts of small value should not be taxed. Examples of these services could be the supply of free warm meals at a place of work or the use of a company bicycle for a private journey, e.g. to a shop to get lunch.

6.5 VAT treatment of taxed free supplies: the taxable amount

Once it has been established that the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, is treated as a supply of goods for consideration, or that the he use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, or the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business is treated as supply of services for consideration, the question rises whether this 'treatment as a supply for consideration' means that all relevant VAT rules apply to this supply.
In the current EU VAT Directive, the only provisions explicitly applying to these transactions that are treated as a supply for consideration concern the determination of the taxable amount for these transactions.

For the taxation of the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.[810]

For the taxation of the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business, the taxable amount shall be the full cost to the taxable person of providing the services.[811]

6.5.1 Taxing the free application of goods

As mentioned above, for the taxation of the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, the taxable amount shall be the purchase price of the goods or

[810] Article 74 of the EU VAT Directive.

[811] Article 75 of the EU VAT Directive.

of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application takes place.[812]

The purchase price of the goods is, in my view, a clear concept. However, the taxable amount shall be the purchase price determined at the time when the application takes place. This could be interpreted as the 'current cost' or 'current value' of the goods. According to the OECD, 'current cost accounting' is a valuation method whereby assets and goods used in production are valued at their actual or estimated current market prices at the time the production takes place (emphasis by me, JB) (it is sometimes described as 'replacement cost accounting').[813] This would mean that if goods have increased in value after their purchase, their actual 'purchase price the time when the application takes place' would be higher than the original cost price. However, in my view, this interpretation of the concept 'determined at the time when the application takes place' is not in line with the rationale behind the relevant provision. Under that rationale, which aims to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type,[814] only the deduction of the VAT incurred on the actual cost of the goods should be adjusted, insofar as these goods are applied for consumptive purposes. Under the current EU VAT rules, this adjustment is made by taxing the application, but the same aim could have been attained by means of adjustments to deduction already made.[815] The latter 'adjustment' is made by 'undoing' the initial deduction by repaying (part of) it.[816] Taxing goods when they are applied for private consumption only achieves the same effect as undoing the original deduction by repaying (all or part of) it when the taxable amount for the adjustment is (based on) the original cost price of the goods. I find support for this view in the CJEU's Oudeland case,[817] where the CJEU holds that the value of a good or service "(…) may be included in the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive (Article 16 of the EU VAT Directive, JB), where the taxable person has already paid VAT on that value and on that cost, but also deducted the VAT immediately and in full". This implies an adjustment of the VAT that was originally deducted, not an adjustment to avoid distortion of competition by levying VAT on a more market value adjusted cost.

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812 Article 74 of the EU VAT Directive.

813 Found on-line on the OECD's website at http://stats.oecd.org/glossary/detail.asp?ID=504 on 3 October 2014.

814 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 46 and the CJEU case law cited there.

815 Proposal for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950 of 20 June 1973, Bulletin of the European Communities 1973, Supplement 11/73, OJ C 80, 5 October 1973, p. 10: "(…) to avoid the enjoyment of unjustified advantages by taxable persons who are entitled to deduct input tax, application of goods to own use, and transfers of goods from a taxable to an exempt business are treated as taxable supplies. The same aim could have been attained by means of adjustments to deduction already made, but the technique of treating these transactions as taxable supplies was chosen for reasons of impartiality and simplicity".

816 See the EU VAT Directive, Title X (Deductions), Chapter 7: 'Adjustment of deduction' (Articles 184-192)

817 CJEU case C-128/14, Staatssecretaris van Financiën v Het Oudeland Beheer BV, ECLI:EU:C:2016:306, paragraph 46.

Goods can be (and are) used for business purposes before being applied by the taxable person for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business. If the business activities do not limit the deductibility of the VAT incurred on the cost of these goods, part of the VAT was rightly deducted because of the use for taxed business purposes. This means that if the goods are applied for consumption purposes after being used for business purposes, not all of the initial VAT deduction should be adjusted, which means that the residual value of the goods should be used as taxable amount.[818] This is, in my view, what is meant by 'the purchase price determined at the time when the application takes place'.

The European VAT Directive does not provide the guidance necessary for defining uniformly and precisely the rules for establishing the 'purchase price of the goods or similar goods, determined at the time of the supply' or the 'the cost price, determined at the time of the supply', and neither does any other binding European legislation (e.g. the Implementing Directive). This means that the European Member States have a certain margin of discretion as regards those rules, provided that they do not fail to have regard to the aims and role of the provision at issue within the scheme of the EU VAT Directive.[819] The purpose of the provision under which the application of business assets is deemed to be a taxable supply insofar as VAT has been deducted on the goods or the component parts thereof, is to prevent non-taxation of private consumption (application) of goods where VAT has been deducted that can be attributed to that private consumption, as I explained above. This is achieved by creating a correspondence between the deduction of input VAT and the charging of output VAT.[820] As regards the determination of the taxable amount, the CJEU has indicated that only expenses that relate to the goods themselves, such as the writing-off of depreciation, may be taken into account.[821]

Under the current EU VAT case law, VAT deducted on the purchase of services (used for the goods that are applied for consumptive purposes) and on goods that are not considered 'component parts' of the applied goods, should not be adjusted by including the residual value of those goods and services to the taxable amount for the taxable application of the good, but by making an adjustment of the deducted VAT through the 'normal' adjustment system.[822] In my view, the relevant provisions for

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818 CJEU joined cases C-322/99 and C-323/99, Finanzamt Burgdorf and Hans-Georg Fischer (C-322/99) and Finanzamt Düsseldorf-Mettmann and Klaus Brandenstein (C-323/99), ECLI:EU:C:2001:280, paragraph 80.

819 CJEU case C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573, paragraph 28.

820 CJEU case C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573, paragraph 33.

821 See CJEU case C-230/94, Renate Enkler and Finanzamt Homburg, ECLI:EU:C:1996:352, paragraph36, which deals with the use of goods and not the application but which is, in my view, based on the same principle, i.e. that the 'residual value' of the goods at the time of the taxable event should be used as (basis for determining the) taxable amount.

822 See, for example, CJEU joined cases C-322/99 and C-323/99, Finanzamt Burgdorf and Hans-Georg Fischer (C-322/99) and Finanzamt Düsseldorf-Mettmann and Klaus Brandenstein (C-323/99), ECLI:EU:C:2001:280, paragraphs 88-95.

determining the taxable amount provide sufficient room for including (some of) those costs in the taxable amount. In my view, the addition of the phrase "determined at the time when the application (…) takes place" to "the purchase price of the goods or of similar goods (…)" implies that the value at the time of the application may have increased because of (some of) the purchased services that have not been fully consumed at the time of the application. The value of these services should, in my view, be included in the 'residual value' of the goods that are applied for private consumption purposes, as should the cost of the goods that are not considered 'component parts'. Besides the fact that this is, in my view, correct from a theoretical point of view, this method (i.e. including the value of relevant goods and services in the taxable amount for the adjustment instead of making a separate adjustment – based on a different adjustment method – for these costs) is also easier to apply by taxpayers who, under the current case law, have to apply two different adjustment methods to the application of a single good.[823]

In my view, the above does not apply to all services performed with regard to the goods forming business assets that are applied for private consumptive purposes. Only the value of services that have given rise to a lasting increase in the value of the good and which have not been entirely consumed at the time of the allocation should be included in the taxable amount.[824] The same applies to component parts and other goods added to the good that is applied for private purposes. Under CJEU case law, 'component parts' are goods that have definitively lost their physical and economic distinctiveness as a result of being incorporated in the relevant good(s) that are applied (or used) for private consumption.[825]

For calculating the 'residual value' based on the writing-off of depreciation, Member States are allowed to force taxpayers to apply a depreciation period that is the same as the period used for the 'capital goods adjustment scheme'.[826] The advantage of using the same periods for these calculations would be that this would make it possible to avoid as far as possible, in the interest of equality between taxable persons and final consumer, cases of untaxed end use where the assets are transferred free of VAT by taxable persons.[827]

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823 It could be that even more adjustment methods apply, if a Member State has decided to retain one or more deduction-exclusions under Article 176 of the EU VAT Directive, like the Netherlands. Also, different rules apply to the private use and application of real estate. This means that some countries actually apply four different adjustment systems for adjusting VAT for private consumption.

824 See, in a different context but under the same rationale, CJEU joined cases C-322/99 and C-323/99, Finanzamt Burgdorf and Hans-Georg Fischer (C-322/99) and Finanzamt Düsseldorf-Mettmann and Klaus Brandenstein (C-323/99), ECLI:EU:C:2001:280, paragraph 70.

825 CJEU joined cases C-322/99 and C-323/99, Finanzamt Burgdorf and Hans-Georg Fischer (C-322/99) and Finanzamt Düsseldorf-Mettmann and Klaus Brandenstein (C-323/99), ECLI:EU:C:2001:280, paragraph 70.

826 CJEU case C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573.

827 CJEU case C-72/05, Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut, ECLI:EU:C:2006:573, paragraph 48.

In my view, the taxable amount should only include 'direct costs' and not overhead cost components such as 'use of office space', depreciation costs of business assets used for making the goods etc. Even though the relevant provision states that the taxable amount should be 'the cost price', 'general costs' should in my view not be included, if only because this would make an exact calculation of the taxable amount virtually impossible. Also, from a more principled view, including general costs would diverge too far form an adjustment principle whose aim could also be achieved by the (general) VAT adjustment mechanism.

6.5.2 Taxing free services

As I described above, the supplies of services that are covered by the provision that deems these transactions to be supplies of services made for consideration are the use of business assets, insofar VAT has been deducted on the purchase of these goods was wholly or partly deductible and the supply of other services free of charge, both for, in short, private consumption purposes.[828] The taxable amount for these two types of taxable transactions is the same: the full cost to the taxable person of providing the services.[829] I elaborated on the fact that in my view, 'the full cost' clearly implies that also cost components on which no VAT was incurred or deducted should be included in the taxable amount. This is supported by the fact that for services that are not the use of business assets, VAT deduction is included in the relevant provision as a requirement for taxing the supply of the service.[830]

I also elaborated on the fact that CJEU case law exists where services purchased from third parties are 'resupplied' for free seem to be covered by the relevant provisions, which leads me to the conclusion that the provisions indeed apply to purchased services as well. CJEU case law I quoted in the previous section seems to imply that the 'regular' VAT adjustment rules should apply to purchased services, but because this case law specifically deals with services that were performed to increase the value of a good, I will not apply this 'rule' to all services. As I explained, in my view the 'adjustment through taxation' rules should apply to most purchased goods or services that are subsequently applied or used for consumption purposes, unless the EU legislation specifically says differently. This is in my view supported by the fact that the EU legislator made a deliberate choice in favour of adjustment through taxation, stating that the same goal (avoiding non-taxation of private consumption) could have been achieved through the application of the 'regular' adjustment system, but that the 'adjustment through taxation'-system was chosen for reasons of impartiality and simplicity.[831] This means that, in my view, the main adjustment system, also for bought-in services, should be taxing the free supply of the goods or services.

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828 Article 26 of the EU VAT Directive.

829 Article 75 of the EU VAT Directive.

830 Article 26(1)(b) of the EU VAT Directive.

831 Proposal for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax: Uniform basis of assessment, COM(73) 950 of 20 June 1973, Bulletin of the European Communities 1973, Supplement 11/73, OJ C 80, 5 October 1973, p. 10.

The taxable amount for services that are used/supplied for private consumption is the full cost of providing these services. The aim of the relevant provision is to ensure equal treatment as between a taxable person, who was able to deduct the VAT on the acquisition or construction of those goods, and a final consumer, by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them.[832] To me, it makes sense to include the value of 'internal services' such as labour, on which no VAT was incurred (and therefore not deducted) in the taxable amount because a final customer would have had to pay VAT on these services.

The above may sometimes lead to situations of (seemingly) unequal treatment where the supply of goods includes a large labour component, e.g. the supply of prepared food. When it is a supply of goods, the labour component remains untaxed, and when it's a supply of services, the labour component should be included in the taxable amount.

Similar to the free supply of goods, in my view, the taxable amount should only include 'direct costs' and not overhead cost components such as 'use of office space', depreciation costs of business assets used for performing a service etc. Even though the relevant provision states that the taxable amount should be 'the full cost' of providing the relevant service, 'general costs' should in my view not be included, if only because this would make an exact calculation of the taxable amount virtually impossible. Also, from a more principled view, including general costs would diverge too far form an adjustment principle whose aim could also be achieved by the (general) adjustment mechanism.

6.6 Do 'the other VAT rules' apply to supplies that are deemed to be made for consideration?

Under the relevant provisions in the EU VAT Directive, the free application and use of goods and services for private consumption are treated as a supply of goods or services for consideration. This raises the question whether the 'other' relevant VAT rules apply to these supplies, such as the rules for determining the place of supply, the VAT rate, the exemptions, the liability provisions etc. I will briefly discuss the possible applicability of the various other VAT rules below.

6.6.1 Place of supply

The 'adjustment through taxation' rules are meant to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same

832 CJEU case C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254, paragraph, 54.

type.[833] Using that as basis for the adjustment, it would make sense to tax these transactions (where possible) at the place of actual consumption, which would be achieved by applying the relevant 'place-of-supply-rules' to these transactions. On the other hand, if the initial purchase would have been made by an end-consumer that is unable to deduct VAT, adjusting the VAT in the same country as where the VAT was originally charged makes sense. In my view, since the provisions aim to adjust the earlier deduction, taxation should take place in the same jurisdiction (country) as the initial deduction, implying that the place of supply rules should not be applied to these transactions. This can be in line with the aim of the EU VAT which is taxing expenditure on local private consumption, working under the assumption that the application should be treated the same as the situation where the business applying the assets for consumption purposes should be compared to a consumer purchasing the same goods in the same jurisdiction.

Some EU Member States do not agree with the view that place-of-supply rules do not apply to the provisions in Articles 16 and 26. For example, Germany has implemented a specific rule for determining the place of supply of free goods and services leading to private consumption that are treated as taxable transactions. Under the relevant German provision, which is not an implementation of any provision in the EU VAT Directive, these services are deemed to be performed from where the supplier of the services is established or from the fixed establishment used for providing these services.[834]

However, the fact that no such provision exists in the EU VAT Directive as well as my comments above – i.e. the fact that the provisions are meant to undo VAT deduction – indicate to me that actually, a new provision should be included in the EU VAT Directive, ensuring that the 'place of supply' of such transactions is the country that refunded the VAT on the purchase of the relevant goods or services. This could lead to difficulties where a composite transaction were to be applied for private purposes, if the various elements for this composite supply would be procured from different countries. In those cases, the transaction should be taxed in the country that allowed VAT deduction on the purchase of the main element of the composite supply in cases of absorption (see Section 4.2.1.1). I appreciate that this could lead to administrative issues like having to VAT register in the country where VAT deduction was claimed. Therefore, it could be a more practical option to apply the 'general rule' for determining the place of supply of services from Article 45 of the EU VAT Directive, i.e. the place where the supplier has established his business or has a fixed establishment from where he performs his services. In case of amalgamation (see Section 4.2.1.2), the same 'general rule' should be applied.

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833 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 46 and the CJEU case law cited there.

834 Article (§) 3f of the Umsatzsteuergericht 1980, accessible on-line at http://www.gesetze-im-internet.de/ustg_1980/__3f.html (last accessed on 20 October 2014).

6.6.2 VAT rates

Because the 'adjustment through taxation' rules are meant to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type,[835] it would make sense to apply the same VAT rate to 'deemed output' as the VAT rate that applied to the purchase (and that was deducted). Also, the wording of the relevant provisions does not imply any restrictions regarding the application of any of the VAT rules to the transactions that are treated as supplies for consideration.

No specific rules are included in the EU VAT Directive for situations where the applicable VAT rate was changed between the time of deduction and the time of private use or application. If the taxation was purely meant to retroactively undo VAT deduction, the same VAT amount as originally deducted should become payable upon consumption (proportional to the private consumption). This would require the application of the original VAT rate. Under the current EU VAT rules, this is, however, not foreseen. This could be an(other) argument for the application of an adjustment system that retroactively disallows deduction rather than by taxation.

The economic and commercial reality of these transactions would require the application of the same VAT treatment, because of the fact that the free supply should be treated the same as if the (original) supply was made to a person that is unable to deduct VAT as final consumer. This is also in line with the purpose of EU VAT, i.e. taxing the expenditure on local private consumption.

6.6.3 Exemptions

A difference in VAT treatment exists between supplies that are exempt 'without credit' and supplies that are exempt 'with credit'. Supplies that are VAT exempt without credit are the supplies included in Articles 132-136 and 371, 375, 376, 377, 378(2), 379(2) and 380 to 390c of the EU VAT Directive. Examples are the provision of medical care,[836] educational services[837] and the supply of services and goods closely related to welfare and social security work.[838]

Under Article 168 of the EU VAT Directive, VAT can be deducted in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person. This means that that VAT cannot be deducted if it was paid for goods or services in so far as they are used for VAT exempt purposes. An exception to this rule is included in Article 169(b) and (c) of the EU VAT Directive, which allows deduction of VAT paid for goods and services that are used for transactions which are exempt pursuant to

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835 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 46 and the CJEU case law cited there.

836 Article 132(1)(c) of the EU VAT Directive.

837 Article 132(1)(i) of the EU VAT Directive.

838 Article 132(1)(g) of the EU VAT Directive.

Articles 138, 142, 144, 146 to 149, 151, 152, 153,156, 157(1)(b), 158 to 161 or 164 of the EU VAT Directive, or which are VAT exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community. These transactions are VAT exempt 'with credit' meaning that even though they are VAT exempt, performing these transactions does not disallow VAT deduction. Other supplies that are VAT exempt with credit are included in Articles 138-164 of the EU VAT Directive.

As a general rule, as formulated by the CJEU, the terms used to specify the exemptions in the EU VAT Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.[839]

Below, I will make a distinction between the possible application of an exemption to free supplies without credit and with credit.

6.6.3.1 Exemption without credit - the private application or use of business assets that are goods

The EU VAT Directive provides for a number of supplies of goods that qualify as a VAT exempt supply of goods without credit,[840] such as the supply of dental prostheses by dentists or dental technicians. Even though it may seem hard to imagine a dentist providing one of his clients with a free dental prosthesis as a promotional activity, that supply should be covered by the VAT exemption in Article 132(1)(c). However, because these supplies would also be VAT exempt if performed for consideration, the dentist in my example would not have been able to deduct the VAT on the purchase of dental prostheses in the first place.[841]

Under Articles 16 and 26 of the EU VAT Directive, the free supply or application of business assets is only taxable insofar as VAT was deducted on the purchase of those assets. This will, therefore, probably not be the case. Therefore, if no VAT was deducted, these supplies are not treated as supplies that are made for consideration, which means they cannot be treated as VAT exempt either.

The transactions that are treated as taxable supplies under Articles 16 and 26 of the EU VAT Directive were introduced to ensure that the business that deducted the VAT on the purchase of the items should be treated the same as a consumer buying the same items in the same jurisdiction. If the supply of a good directly to a consumer would be VAT exempt, the same supply made to a business should also be treated as

839 See, for example, CJEU case C-284/03, Belgian State v Temco Europe SA., ECLI:EU:C:2004:730, paragraph 17 and the case law cited there.

840 Under Article 167 jo. Articles 132(1)(d), (e), (g), (h), (l), (n) and (o), 135(1)(j) and (k) and 136(a) and (b).

841 See Article 168 of the EU VAT Directive.

VAT exempt (unless specific provisions in the EU VAT Directive would require the recipient of the supply to have a specific status).

6.6.3.2 Exemption without credit – the free supply of services (other than the use of business assets)

The EU VAT Directive provides for a number of supplies of services that qualify as a VAT exempt supply of goods without credit, such as the supply of medical care in the exercise of the medical and paramedical professions.[842] In this respect, an example could be a business that employs a qualified medical professional to provide medical care for its employees but also for their family members, for free. Assuming that these services are provided for purposes other than those of the business, these free medical services should, in my view, be treated as VAT exempt. The transactions that are treated as taxable supplies of services under Article 26 of the EU VAT Directive are meant to ensure that the business that uses these services for making the free supplies should be treated the same as a consumer buying the same services in the same jurisdiction. Also, the type of services performed for free should be covered by the terms used to specify the exemptions in the EU VAT Directive.

6.6.3.3 Exemption with credit - the private application or use of business assets that are goods

The VAT exemptions regarding the supply of goods that allow VAT deduction only relate to cross-border supplies of goods.[843] The supply of goods to a business that is established in another EU Member State, where these goods are transported by the supplier to another Member State as a result of that supply, is an example of such a VAT exempt supply.[844]

The private application or use of business assets that are goods could qualify as VAT exempt intra-Community transaction if, for example, the goods are supplied for free to another business that is established in another EU Member State, and the goods are transported to this business as a result of this supply.[845]

Application of the zero rate to this supply would imply that the supply qualifies as an intra-Community supply of goods,[846] which would require the recipient of the goods to account for VAT on the intra-Community acquisition of these goods in the country where the transport of the goods ends.[847] The person liable for this VAT is the recipient of the goods.[848] This means that if all relevant VAT rules would apply to this

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842 Article 132(1)(c) of the EU VAT Directive.

843 Articles 138, 146 to 148, 151, 156, 157(1)(b), and158 to 161 of the EU VAT Directive.

844 See Artcle 138 of the EU VAT Directive.

845 Under the tekst of Article 138 of the EU VAT Directive.

846 See Article 20 of the EU VAT Directive.

847 Under Articles 40 and 200 of the EU VAT Directive.

848 Under Article 200 of the EU VAT Directive.

transaction, the recipient of the free goods would have to account for VAT (as payable) on the acquisition of his 'gift' to an amount that is unknown to him (probably nil, as that would be his purchase price). He would technically account for the VAT that, basically, should be adjusted by the provider of the goods.

However, because the relevant rules regarding the taxation of gifts under the 'taxation of free supplies for private consumption' provisions are a method of adjusting the VAT deducted by the supplier of the goods or services, the liability for this adjustment should not be shifted to another party. For the same reason, the zero rate should not be applied: that would not cause any adjustment of the deducted VAT. In my view, this also applies to goods that are supplied (for free) to recipients outside the EU.

I would suggest solving this issue by applying the reasoning that Articles 16 and 26 of the EU VAT Directive were introduced to ensure that the business that deducted the VAT on the purchase of the items should be treated the same as a consumer buying the same items in the same jurisdiction. This means that VAT has to be adjusted or paid in the country of deduction, implying that the 0% VAT rate cannot be applied as this would not lead to the envisaged adjustment. Therefore, based on the purpose of the relevant EU VAT rules, the VAT exemption with credit should not apply to these transactions. This would also lead to the same result as disallowing the VAT deduction on the purchase of these goods, which was suggested by the EU VAT legislator as an alternative method for achieving the same goal, see Section 6.2.

6.6.3.4 Exemption with credit - the private use of services, not being the use of goods

The VAT exemptions regarding the supply of services that allow VAT deduction mainly relate to services connected with the cross-border supplies of goods.[849] However, there are some services that are VAT exempt with credit that do not relate to cross-border supplies of goods, such as certain financial services where the recipient of these services is established outside the EU.[850] I can't think of any examples where any of these services would be provided free of charge for other than business purposes. Therefore, performing these services free of charge should, in my view, never lead to the provision of a taxable transaction and therefore, the VAT exemption should never be applicable.

6.6.4 Liability rules

The 'adjustment through taxation' rules are meant to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same

[849] Articles 142, 144, 146,148, 149, 151, 153, 159 and 164 of the EU VAT Directive.

[850] Articles 135(1)(a) to (f) jo. Article 169(c) of the EU VAT Directive.

type,[851] as well as a way of adjusting the initial VAT deduction to ensure that goods or services are not consumed free of VAT. This is achieved by taxing the supply, use or disposal of the goods or services for free. As mentioned, the payment of the VAT on these transactions serves as an adjustment of the VAT previously deducted. In my view, this means that only the business that deducted the VAT, i.e. the business that makes the free supply, should be held liable for the VAT on these free supplies.

6.6.5 Deduction of input VAT

Under the relevant provisions regarding the deduction of VAT, VAT incurred or due on the purchase of goods or services used for taxed transactions can be deducted.[852] Because the supply of free goods or services for consumption purposes is a taxed transaction, the VAT incurred on the cost of these supplies can be deducted insofar as the business incurring these costs has the right to deduct input VAT. I elaborated on this in Section 6.3.3.4.

VAT on costs of goods or services used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.[853] As a general rule, the deductible proportion shall be made up of a fraction comprising as a numerator, the total amount (exclusive of VAT) of turnover per year attributable to transactions in respect of which VAT is deductible and a denominator, the total amount (exclusive of VAT) of turnover per year attributable to transactions included in the numerator and to transactions in respect of which VAT is not deductible.[854]

A relevant question for this thesis is whether the taxable amounts regarding the free supply, disposal or use of business assets and services should be considered 'turnover' for the purpose of the above provision regarding the calculation of the deductible proportion. In the dictionary, 'turnover' is defined as 'the amount of money taken by a business in a particular period'.[855] Because businesses do not make any money (or at least not as a consideration from a VAT perspective) for their free supplies, no turnover in the general sense of the word is generated by these transactions.

There is only one provision in the EU VAT Directive that explicitly includes a definition of 'turnover', where turnover is used as a measure to determine whether a special scheme can be applied.[856] Under this definition, "the value of supplies of goods and

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851 See CJEU case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:711, paragraph 46 and the CJEU case law cited there.

852 Article 168 of the EU VAT Directive.

853 Article 173 of the EU VAT Directive.

854 Article 174(1) of the EU VAT Directive.

855 Oxford Dictionaries, accessed on-line at http://www.oxforddictionaries.com/definition/english/turnover on 27 February 2019.

856 Article 288 of the EU VAT Directive.

services, in so far as they are taxed" is considered turnover. However, in my view, the taxable amount for the transactions that are treated as if they were performed for consideration should not be considered turnover in the sense of the VAT rules and regulations. I find substantiation of this view in CJEU case law that determines that "in so far as the taxable person has not issued any invoice (…) and has received no payments (…), that work does not constitute the delivery of goods or the provision of services (…) by the taxable person (…). It must not therefore be included in the denominator of the fraction referred to in Article 19(1) of the Sixth Directive for the calculation of the deductible proportion."[857]

6.6.6 Other VAT rules

In my view, the other EU VAT rules, e.g. the rules regarding bookkeeping requirements etc., all apply to the free supplies that are treated as supplies for consideration as well, provided that these rules do not shift or create liabilities (invoicing, accounting, reporting or other) to or for the recipient of the gifts.

6.7 Summary

Goods and services are often provided free of charge as a business promotion, with or without the use of a voucher. Giving away goods and services for free to customers leads to consumption. As VAT is aimed at taxing (expenditure for) local private consumption, I have researched in this Chapter the current and appropriate or desirable VAT treatment of free supplies, taking into account the tension between the right to deduct VAT on business related costs and the need to tax consumption. I used the EU concept of 'commercial and economic reality' as well as the purpose of the relevant EU VAT rules to establish the VAT treatment of supplies made for no consideration.

As a general rule, the VAT on the purchase for goods and services purchased by a taxable person acting as such, where these goods and services are purchased at least partially for taxed business purposes, can be fully deducted. Insofar as these goods or services are also used for non-economic activities, the VAT on the costs relating to these non-economic activities cannot be deducted.

The subsequent application of those goods, forming part of the business assets of the taxable person, for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. Application for non-economic activities is not covered by 'for purposes other than those of his business'. The application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.

857 CJEU case C-536/03, António Jorge Ldª v Fazenda Pública, ECLI:EU:C:2005:323, paragraph 26.

The subsequent use of the goods forming part of business assets for the private use of the taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible, as well as the supply of services carried out free of charge by the taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business, shall be treated as a supply for consideration. If the element of private consumption is so small, compared to the business reasons for making the free supply, that the supply is, in fact, not made for purposes other than those of the business of the taxable person, the transaction will not be taxed.

The above rules do not apply to the purchase and application or use of immovable property for private purposes. Special rules apply, where the VAT on costs can only be deducted insofar as the property is used for actual taxed activities, and a yearly adjustment system applies. It is also possible that the VAT on certain expenses is not deductible for other reasons, for example if a Member State applies non/recovery rules from before the accession to the EU under a standstill provision. Also, the VAT on expenses for capital goods owned by third parties is only deductible if the expenses do not exceed what is objectively necessary to allow a business to carry out its taxed transactions.

For transactions leading to private consumption that are treated as if they were performed for consideration, the taxable amount is either the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application takes place (for the application of business assets) or full cost to the taxable person of providing the services (for services).

Even though the relevant provisions entail that certain transactions are treated as supplies for considerations, not all relevant VAT provisions automatically apply to these transactions in the same way as they would to ‘regular’ transactions for consideration as performed by a supplier for his customer. This is especially true for the rules for determining the place of supply and the rules regarding the application of a VAT exemption with credit.

Establishing the appropriate VAT treatment of free supplies helps me to establish the appropriate VAT treatment of vouchers, which I do in Chapter 9.

7 Bartering

So far, I've examined how to determine whether a supply is made for consideration and if a multiple-element supply is made, how to determine whether the consideration received by the supplier should be allocated to all elements of that transaction. All these transactions were looked at from a supply-for-cash perspective. Where the consideration for a supply is in cash, both the payment itself as well as the value of the payment can easily be ascertained. This is different for barter transactions, especially where no (additional) cash payments are involved.

Bartering is also used for promotional activities. Potential customers can be enticed to make a purchase in return for a non-monetary compensation, e.g. by trading in an 'old' item or by performing a service. Some businesses provide goods or services in return for favourable on-line reviews by people with sufficient media coverage ('bloggers' and 'vloggers'). Social media allow 'free' access and use in return for personal data of their users. Vouchers can also be used as an instrument that facilitates bartering, e.g. as an instrument for determining the value of the bartered transactions.

In this thesis, I will use the term 'bartering' for one or more taxable transactions, where both parties involved will make a supply of (a) good(s) and/or (a) service(s) in return for the other person's supply. They will, in principle, not (also) make a cash payment for these supplies, unless a cash payment is needed/agreed to settle the difference in value between the supplies made by the parties involved. In the dictionary, bartering is described as exchanging goods or services for other goods or services without using money.[858]

7.1 Bartering as (part of) a promotional activity

Bartering can be part of promotional activities. Examples of promotional activities that include bartering are:

- Trading in used goods (old shoes, old laptop computer) for a 'discount' on new goods or services,
- Allowing a retailer to use your personal information combined with your personal purchase history to grant you personalised discounts and/or make you personalised offers,
- A manufacturer granting a retailer a discount on the 'normal' price of his products in return for which the retailer will display the products in a more noticeable or attractive store (shelf) location,
- Introducing a friend as a potential client to a mail order company in exchange for a 'free' gift,[859]

858 Oxford Dictionaries, free online version, last visited on 7 December 2014 (http://www.oxforddictionaries.com/definition/english/barter).

859 The CJEU ruled on the VAT consequences of a very similar barter exchange in CJEU case C-33/93, Empire Stores Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1994:225.

- ‘Tupperware parties’ where the host to a party receives a ‘free’ gift for hosting a (successful) party,[860]
- Sponsoring in kind (e.g. supplying a car for every player in the first team of a football club in exchange for the car’s brand name on the shirts of the players),
- Allowing an ‘anchor tenant’ to use floor space in a building for no rent because he attracts other tenants (i.e. some sort of ‘advertisement services’ exchanged for use of floor space),[861]
- Writing or recording an on-line review (blogging, vlogging) of certain products in return for goods or services from the business selling or manufacturing the reviewed products,[862] and
- Allowing the use of personal (user) data in return for the access to and use of social media.[863]

7.2 A brief introduction to the VAT issues surrounding bartering

From a VAT perspective, bartering raises questions regarding the determination of the taxable amount and the amount of deductible VAT. It is also not always clear whether both parties to a barter transaction qualify as a taxable person from a VAT perspective (and not just one of them), especially if one of the parties involved is a natural person (as opposed to a legal person).

If the consideration for a supply does not consist (entirely) of money, the value of this consideration must be determined differently. I will discuss the current rules for this in this chapter. Also, it may prove impossible to express the consideration for the provision of a good or service in (an exact amount of) money, which, under the current EU VAT rules, is a requirement for the ‘payment in kind’ to be considered a VAT relevant ‘consideration’.[864] In some cases the terms of a barter transaction may be affected by a connectedness between the parties involved, which may lead to further complications in ascertaining the correct taxable amount and deductible amount.

Also, in a case where two taxable businesses are involved in a barter transaction, the amount of VAT that can be deducted as included in the consideration (in kind) paid for the supply has to be established. I will address all these issues in this chapter.

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860 The CJEU ruled on the VAT consequences of a very similar barter exchange in case CJEU case 230/87, Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise, ECLI:EU:C:1988:508.

861 The CJEU ruled on the VAT consequences of a very similar barter exchange in case C-409/98, Commissioners of Customs & Excise v Mirror Group plc., ECLI:EU:C:2001:524.

862 A. Sanders, J.B.O. Bijl, Bloggen en vloggen: #btw?, BtwBrief 2016/93, Wolters Kluwer, Netherlands.

863 See, for example, S. Pfeiffer, VAT on “Free” Electronic Services?, 27 Int'l VAT Monitor 3 (2016), Journals IBFD.

864 See CJEU case 154/80, Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA, a cooperative association [1981] ECR 445, paragraph 13.

I will first discuss some background with regard to bartering, before further examining the VAT consequences of these types of transaction.

7.2.1 Why do people and businesses barter?

The question as to why people barter can be relevant for this research. VAT is an indirect consumption tax. The aim of the tax is to tax expenditure on (private) consumption. Under the applicable VAT rules, this consumption is measured or valued by what is received by the supplier (the taxable person making a taxable supply) in return for his supply. In case of bartering, this is (the value of) the (received) payment in kind. This implies that specific reasons for bartering may affect the valuation of the transaction, as I will explain 7.2.3. I will first examine the possible reasons for bartering.

Reasons for bartering can broadly be categorised as follows:[865]

1. bartering because of absence of money (a monetary system) or different valuations of money as such,
2. bartering because of (temporary) insufficient cash/cash flow (e.g. temporary insufficient financial solvency), and
3. bartering because of what I will call 'economic benefit'.

Of course, bartering can also be a result of any combination of these categories.

A reason for accepting specific (e.g. at first sight unfavourable) terms in a barter transaction can be based on, amongst other things, an 'emotional' or 'relational' component to the transaction, as I will also explain Section 7.2.2.

I will now briefly examine the above reasons for bartering or entering into specific barter transactions and establish which ones are relevant for this research and why.

7.2.1.1 Bartering in absence of money or because of different valuations of money as such

If there is no money (e.g. due to the absence of a (stable) monetary system) and someone wants a good that is owned or a service that can be performed by someone else, this can usually only be obtained by trading it for something the person has that the other person wants in return.

Also, there was a time when the value of legal tender was determined by the actual value of the commodity of which the tender was made (e.g. gold and silver coins), which was basically barter trade using 'in-between goods' (currency) with an agreed fixed value. This was called 'commodity money'[866] as opposed to the 'representative money' that is used in most economies nowadays.[867]

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865 See, for example, Humphrey, C. and Hugh-Jones, S. (1992) (ed.) Barter, exchange and value. An anthropological approach, page 5. Cambridge: Cambridge University Press and Matison, J. and Mack, R. (1984) The Only Barter Book You'll Ever Need. How to Swap, Barter and Trade – And Make Your Best Deal! New York: Bantham Books.

866 Murray N. Rothbard, A History of Money and Banking in the United States: The Colonial Era to World War II, Ludwig von Mises Institute, 2002, p. 48.

867 John Maynard Keynes, A Treatise on Money, Macmillan & Co Ltd., UK, 1930, p. 263.

Bartering also occurs where the two parties involved in a transaction attribute a different value to money as such. A historic example is the trade of oil and other commodities between the former Soviet Union and Eastern bloc countries and the capitalist West. In the former Soviet Union and Eastern bloc countries, money had a different value than in the Western countries, because in the former Soviet Union and Eastern bloc countries most necessities were provided for by the state and money could not be used to buy much anyway, which was completely different in the Western countries. The former Soviet Union and Eastern bloc countries (or: the people and businesses in these countries) therefore did not need or use money for the same reasons as (the people and the businesses in) the West. As a result, trade between the former East and West was often conducted in the form of barter transactions.[868]

Another example of a barter transaction based on the difference in valuation of money is a European art dealer who, on a journey through a tropical rainforest, comes across a priceless artefact that he could sell for a lot of money in his art gallery in Europe. The local owner of the artefact is not interested in money and will only part with it in return for a healthy cow. The art dealer manages to get to the nearest village, 80 kilometres away, and buys a cow for the equivalent of 130 Euro. He gets the cow back to the owner of the artefact and the deal is concluded. This transaction could only take place because from the perspective of the owner of the artefact, a cow is much more valuable than any amount of money.[869]

Another way of looking at the reason for this second barter transaction to take place could be the inequality between the parties involved, which is abused by one of them. However, it is unlikely that the original owner of the artefact will feel 'cheated', unless he will learn that, from the perspective of the purchaser of the artefact, there was no equality in the value of the cow and the artefact (as is also clear from the saying "one man's trash is another man's treasure").[870]

Because in this research I focus on the VAT consequences of promotional activities under the rules applicable in the EU, I will assume that bartering because of the absence of money or a difference in perception of the value of it will not occur. Therefore, this reason for bartering is not relevant for this research.

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868 Humphrey, C. and Hugh-Jones, S. (1992) (ed.) Barter, exchange and value. An anthropological approach, page 5. Cambridge: Cambridge University Press.

869 I based this example loosely on an example that can be found in Humphrey, C. and Hugh-Jones, S. (1992) (ed.) Barter, exchange and value. An anthropological approach, page 1. Cambridge: Cambridge University Press.

870 For more background on this kind of bartering I refer to Floris W.M. Keehnen, Trinkets (f)or Treasure? The role of European material culture in intercultural contacts in Hispaniola during early colonial times, Leiden University, 2012, to be found on-line at https://openaccess.leidenuniv.nl/bitstream/handle/1887/19487/KeehnenF_RMA%20Thesis.pdf?sequence=3 (last visited on 6 November 2017).

7.2.1.2 Bartering because of (temporary) insufficient cash/cash flow

Another reason for bartering for both businesses and private individuals is lack of cash (e.g. a situation of temporary financial insolvency). If a business possesses unused goods, e.g. stock that it has produced, or when a business owns goods or employs people that they can't deploy to their full potential, these 'means' can be used for bartering, especially in situations where these businesses don't have much cash and/or the cost of financing the purchase of goods/services that can be bartered is higher than the value of the surplus stock/unused assets and people. This motive for bartering is closely linked to the reason I describe next: the economic benefit of bartering.

> Examples
> An example of bartering because of (temporary) absence or lack of cash is an artist that uses his paintings to pay for his bar tab. When the artist is asked to pay for his consumptions, he will be told that he owes the bar a certain amount of cash. If the artist has no money (or does not have enough money) and will not have enough money for some time, he might consider paying his bar tab with one (or more) of his paintings. If the bar owner considers the (future) value of the painting(s) as sufficient payment for the consumptions, a barter transaction may be concluded.
>
> Another example could be a business in (temporary) financial difficulty that owns a multi-storey building and that has had to let go some of its staff. The business now has one or more vacant floors in its building that it could let for cash, but also for a consideration in kind – it could choose to allow its IT-services provider to use the floor(s) as a barter transaction, paying for the IT-services in kind. In this scenario, neither the IT company nor the business would need cash as a consideration for each other's supplies.
>
> In various countries, restaurants exist where people with money can pay the menu price for their food and drinks or a bit more than the advertised price to partially pay for (or sponsor) a needy person so that he or she can eat there as well. The needy person also has the option to work for his or her food and drinks, e.g. by helping to tidy the place or to do/sign up for 'volunteer work'. This latter feature is another example of bartering as a result of lack of money.[871]

Because in this research I focus on the VAT consequences of promotional activities, bartering as a result of a shortage of money is not inside the scope of the research. Businesses generally do not set up promotional activities in the sense of this research in order to allow customers that have financial difficulties to obtain their products by bartering. Therefore, this reason for bartering is not relevant for this specific research.

However, there is only a thin line between bartering as a result of (temporary) shortage of cash and bartering because of economic benefits. Even if the artist in the above example would have enough money, it could still be beneficial for both parties if

[871] An example of this in the USA is Cafe180, see http://youtu.be/R2SNrGS-eXo and http://www.cafe180.org/.

the artist were to pay the bar tab in kind. I will elaborate on this in the next subsection.

I conclude this subsection by observing that, as with most types of barter transactions, usually barter transactions that are driven by 'shortage of cash' are concluded if the (economic) outcome of the transaction is perceived to be equally beneficial to both parties involved. The following famous anecdote is of an example where this was not the case:

> It (the anecdote, JB) concerns Boris Tomashefsky, the great Yiddish actor. He was met backstage one day by an admiring fan, a very pretty girl. Tomashefsky closed the door and the two made love. The next day, the girl returned. She needed help for her sick daughter, she explained, and the actor gave her two tickets for the Saturday matinee. The girl was aghast. 'I need bread, not tickets', she remonstrated. Tomashefsky replied, 'You want bread, screw a baker. Tomashefsky gives tickets'.[872]

7.2.1.3 Bartering because of economic benefit

For the purpose of this section, I will use the term 'economic benefit' for situations where the total cost of paying in kind (i.e. the cost of the good(s) or service(s) used for payment) is lower than the asking price in money of the good(s) and/or service(s) that are to be obtained (or the 'open market value'[873]). If a business produces goods or services, the cost of these products will usually be lower than the (advertised) selling price or open market value of these products. Therefore, using a product as payment/consideration where the open market price of that product is advertised/used as the value to come to a barter transaction can be economically beneficial.

The 'margin' between the cost and the open market value of the goods or services used as payment is the value of the actual 'economic benefit' of such barter transactions. I will illustrate this with the following example, where in the first diagram Company X purchases a good (symbolised by the star) and pays Euro 100 for that good (payment is symbolised by the red arrow), and where in the second diagram the same Company X purchases the same good paying (in kind) with a good (symbolised by the triangle) that it purchased for Euro 80:

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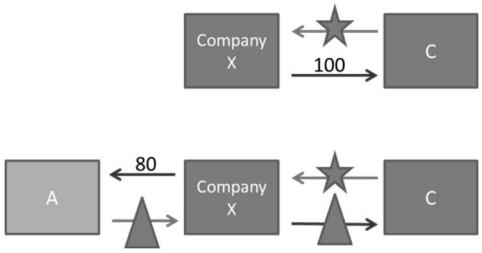
872 Matison, J. and Mack, R. (1984) The Only Barter Book You'll Ever Need. How to Swap, Barter and Trade – And Make Your Best Deal! New York: Bantham Books, p. 237.

873 For the EU VAT definition of 'open market value, see Article 72 of the EU VAT Directive: "(...) 'open market value' shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length (...)"



In this example, spending/paying Euro 80 eventually gets Company X the same product from Company C as paying Euro 100 for it in cash. The 'economic benefit' for Company X in this example is Euro 20 (not taking VAT into account).

Another 'economically beneficial' outcome would occur where Company X would buy materials/components from Company A for Euro 75 which it would convert to a new product by adding own labour (and other elements) with a value (cost) of Euro 10, to produce a new good or service that it then trades for the product it wants to obtain from Company C. In that case, the economic benefit of this transaction for Company X would be Euro 15.

Where 'absence of money' is a reason for bartering as such, 'economic benefit' is a reason for choosing bartering instead of using money/cash.

Examples of bartering for economic benefit

An example of this type of barter is the trade between countries of goods (usually commodities) that they grow or produce in affluence for other commodities, services (e.g. specialist expertise), or other payments in kind (e.g. infrastructural works).

Home swapping is another example of this type of bartering that is very common between private individuals. In this example, the 'cost' of renting a holiday accommodation is the price of allowing someone else to use your (empty) house during your holiday.[874] In this latter type of barter transaction there is no transfer of ownership of/legal title to goods. For businesses (or people) owning assets that they (temporarily) don't use, the cost of allowing other parties to use those assets in return for goods or services is often lower than paying for those goods or services in cash.

Another example is making payments using Bitcoin (or other forms of crypto currency). In countries where Bitcoin is not considered legal tender, payment using Bitcoin is, by definition, a barter transaction.[875] The economic benefit in this case obviously depends on the 'exchange rate' of the Bitcoin at the time of

874 Of course, if agencies are involved, their costs, the cost of cleaning, meeting the users with a key, insurance etc. should also be taken into account.

875 For a taxable person using Bitcion for payment, the 'supply of the Bitcoin' could possibly be considered a VAT exempt transaction (as part of a barter transaction).

use/conversion. Because the VAT aspects of Bitcoin are very specific, and because the use of Bitcoin is not a promotional activity as such, this VAT treatment of Bitcoin (and other crypto currencies) is not included in this research.[876]

Making available or allowing a business access to and use of data generated by a person as a customer in return for specific (personalised) and changing discounts on products or allowing discounts in return for customer loyalty can be considered an example of a barter transaction as promotional activities. I will elaborate on this specific type of barter transaction in Section 7.10.

Another frequently occurring type of barter transactions are 'wages in kind', where employees not only receive salaries in cash, but also in kind. Examples are (the private use of) company cars, company phones and phone subscriptions, payments in shares or options etc. In many countries, these payments in kind are considered (part of the taxable) salary, and thus considered to be paid in return for labour.[877]

Even though strengthening a business relationship by entering into a (longer term) barter deal may be considered an economic benefit, it may also be partly based on emotion. A car manufacturer that builds or strengthens a business relationship by sponsoring the local sports club through providing the star players with free cars in return for shirt advertisement could also demonstrate an emotional connection between the owner of the car manufacturing business and the local team (e.g. as a fan). Can this 'emotional' element be a reason for entering into a bargain transaction? I will answer this question in the next section, demonstrating that an 'emotional' element to a barter transaction does not – as such – affect the VAT treatment of the transaction, unless specific VAT rules dictate otherwise.

Economic benefit as a reason for bartering is relevant for this research, because the businesses that use bartering as a form of promotional activity will usually do this for an economic benefit. The economic benefit may come from the actual specific barter transaction or from the fact that the barter transaction is an element in an effort to create or strengthen a business-consumer relationship.

7.2.2 Emotional benefit as a reason for accepting certain conditions

Besides the economic benefit, a reason for entering into a barter deal can be emotional. This usually occurs if a party paying in kind knows that the goods or services that he provides or uses as payment are (probably) worth more than the goods or services that he gets in return, but he goes ahead with the deal anyway because the deal provides him with an emotional benefit. The party paying knows he is actually 'giving something away' but he does that because of the emotional connection with the other party involved, e.g. family ties, friendship, because it makes him feel good. Building on the earlier example of the artist with a bar debt, it could

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876 For elaborate research on taxation of virtual currency, including the indirect tax treatment thereof, see A.M. Bal, Taxation, virtual currency and blockchain, Wolters Kluwer 2019, and more specifically Chapters 7-9 (pp. 157-250).

877 For a more elaborate view on the VAT treatment of wages in kind, see W.J. Blokland, Taxing Employee Benefits in Kind under EU VAT, 22 Int. VAT Monitor 2, p. 98-104 (2011), Journals IBFD.

also be possible that the bar owner accepts the artist's painting instead of money because they are befriended or because he pities the artist. Obviously, 'giving something away' can also have other than emotional reasons, e.g. business reasons, as I describe in Chapter 6.

The emotional benefit is not (necessarily) a reason for bartering as such, but rather for accepting the terms to a specific barter transaction. The same applies to situations where someone would pay a higher price in money than he considers the supply he receives to be worth objectively.

An example of this 'reason for entering into a bargain transaction' is the owner of a clothes shop that is also the proud father of a boy that plays in a local football team. He decides to provide the whole team with tracksuits from his shop, provided that the name of the shop is printed on the back and that all of them always wear them to games. This is bartering goods (track suits) for services (advertisement), although the value of the advertisement does not necessarily cover the cost of the tracksuits. The fact that it is his son (and his son's team) that he helps out makes him feel good.

However, in my view this 'emotional benefit' is not the reason for him to enter into the barter transaction but rather the reason for accepting the terms to the specific barter transaction. He could also have donated money or paid more money for the advertisement than it would have been worth, although in my view this latter scenario is not as likely to occur as an 'uneven' barter deal because of the extra effect of the economic benefits of a barter transaction as described above.

Giving something (goods, expertise, labour, etc.) out of generosity or for charity, where the barter deal does not include more than obtaining an emotional benefit in return might be considered an example of a transaction concluded purely for the emotional benefit. However, in my view this is not a barter transaction, because the provider of the goods, expertise, labour etc. does not actually get something in return from the recipient. His emotional benefit is purely a product of his own mind (psyche). All supplies and/or payments (the goods, expertise, labour, etc. as well as the 'positive feeling') are made by the same party involved in this transaction, which therefore is not a barter transaction but a donation or a gift.

From the above it is, in my view, clear that the emotional benefit can be an important factor in barter transactions because it can affect the terms of such a transaction. Because Member States are allowed to implement rules under which the taxable amount has to be adjusted for specific transactions in which related parties are involved, the 'emotional' element can be relevant for this research.

7.2.3 Summary: which reasons for bartering are relevant for this research, and why?

As this research is based on the EU VAT system, bartering as a result of differences in valuating money or the absence of money can be ignored as these do not (or hardly) occur in the EU. In this research I will also assume that the bartering parties trade on the basis of equality, not inequality.

The 'emotional' component of a barter transaction can be relevant for this research, because, as mentioned, under the EU VAT rules, Member States are allowed to levy VAT on the open market value of a transaction if the consideration agreed between parties is affected by a relationship between these parties. A reason for related parties to agree a consideration even though they are aware of the fact that it is not (even close to) the market value of the supply could in some cases be the emotional benefit.

Bartering for economic benefit is the most common and relevant type of bartering as (part of) a promotional activity. Therefore, bartering for benefit, whether economical, emotional or both, is what I will focus on in the rest of this Chapter.

7.3 Bartering or trading goods as a condition for a discount or other favourable terms?

In my view, not all situations where goods (or services) are traded for other goods (or services) with an additional payment in cash, qualify as barter transactions. Where a person trades in her old car when buying a new one, the old car will have a value and the value of the supply of the 'old' car to the car business will be offset against the sales price of the new car. This is a barter transaction.

However, if a shoe seller grants its customers a 10% discount if they hand in a pair of old shoes that will go to charity, irrespective of the age of those shoes, this is, in my view, not a barter transaction. The aim of the shoe seller is not (primarily) to obtain those old shoes, but to come up with an incentive for selling more new shoes. The old shoes as such will not represent a specific value to him. The same principle applies to a cookware manufacturer that offers 30% discount on all its pans sold in physical shops of participating retailers, only if the purchaser hands in an(y) old pan at that retailer. The old pan does not represent a proper value or consideration for the new pan either for the retailer (actually making the discounted sale) or for the pan manufacturer (who is likely to be at least partially funding the discount). Again, even though the discount is made conditional to the handing in of the old pan, the scheme is intended to get people to buy (and possibly switch to) pans of the brand of the manufacturer, purchased at the retailer. This way of qualifying these transactions is based on the economic and commercial reality of the transaction (see Chapter 2).

If the retailer does not receive cash back from the pan manufacturer for collecting the old pans and selling the pans at the (conditional) discounted value, it can be argued that the retailer agrees to do this because participating in the scheme will get potential customers to his stores, which creates the opportunity to sell other goods (and services) besides the pan. If this is specifically agreed, and if this trade can be valued in money, it should qualify as a barter transaction.

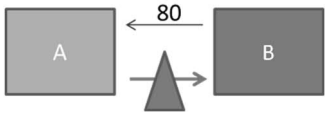
7.4 Bartering and VAT – conceptual difficulties

From a VAT perspective, bartering is in my view not as straightforward as it may seem. At first sight, it appears that where the two parties involved in a barter transaction both qualify as VAT taxable persons, in most cases both parties, from a VAT perspective, will make a taxable supply which, at the same time, is considered a

payment in kind paid in return for the supply made by the other party. However, within the EU VAT system it seems doubtful that the transfer of ownership of – for example – a good should be qualified as being two things at the same time (i.e. within a single transaction): a taxable supply for consideration as well as consideration for a taxable supply.

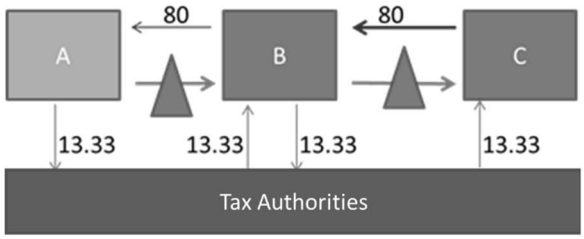
I will illustrate this using an example, where two fully taxable businesses agree a barter transaction where they exchange goods without any additional cash payments. The transaction is concluded between taxable business B and taxable business C.

In the example, taxable business B has purchased a good, item (▲), from A for an amount of Euro 80 (including 20% VAT):



7.4.1 Using a good or service for a taxable supply

I will first focus on the (onward) supply of the good (item (▲)) by B to C for consideration. This is a taxable supply, for which B will receive a consideration.



This consideration will be a VAT inclusive amount and B will have to remit the VAT element from that consideration to the tax authorities. This means that the value of the good (item (▲)) as a supply consists of a VAT inclusive amount: otherwise it would be impossible for part of the payment by C for the good to B to consist of VAT.

This would be the same if B were to sell the good to a non-taxable person: the consideration paid by the non-taxable person will be a VAT-inclusive amount.

If, for example, B were to sell the good (item (▲)) to C for the same price as he paid, i.e. a VAT inclusive amount of Euro 80, B would have to remit Euro 13.33 VAT (i.e. 20%) to the Tax authorities. In the example, C is a taxable business that can deduct the same VAT amount.

7.4.2 Using a good or service as payment/consideration for a taxable supply

Making a cash payment (in return for a taxable transaction) is not a taxable event.[878] However, payments in kind can lead to VAT being due. An example is a company offering an employee a certain amount as a salary in cash, or a smaller amount of cash as well as the use of a company car, in return for the work performed by that employee. The cash salary payments do not trigger any VAT consequences, also because this is explicitly determined in the EU VAT Directive.[879] The use of the company car is, however, subject to VAT. This is caused by the fact that this part of the agreement can be looked at from two sides. From the perspective of the employer, the business that puts the company car at the disposal of its employee, the company actually performs a service for consideration. It is this service, as performed by the business, that is subject to VAT, not the work performed by the employee. That work is the consideration 'paid' by the employee for having a company car at her disposal.[880] However, it can also be argued that the actual difference between the 'full cash salary' and the 'lower salary' from the above example is actually a (cash) payment by the employee for the use of the car – she effectively uses part of her wages to pay for that company car, which would no longer make this a 'consideration in kind'. I will elaborate on these options in Section 7.4.3.

In my view, a 'payment in kind' does not exist, from an EU VAT perspective. There are always two separate transactions where the monetary consideration is settled. I am of this view despite the fact that local EU VAT legislation[881] and CJEU case law suggest that payments in kind do exist and that they have their own VAT treatment. Of course, economically, 'payments in kind' do exist, and parties to an agreement where goods and/or services are supplied with no additional cash payment can consider their supplies to be 'payments in kind', but from a VAT perspective this does not make sense to me, as I will explain in the next Section.

7.4.3 Can the supply of a good or service be a payment at the same time?

In the above section I come to the conclusion that a payment in kind is not a transaction that is subject to VAT. I now answer the question whether a taxable supply can also, i.e. as part of the same transaction, be a payment (in kind) from an EU VAT perspective. In my view, this is not the case.

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878 CJEU case C-409/98, Commissioners of Customs & Excise v Mirror Group plc., ECLI:EU:C:2001:524, paragraph 26.

879 Article 10 of the EU VAT Directive.

880 Note that this is only the case if the car is an explicit component of the employment agreement and recognised in that agreement as something offered in return for the work performed by the employee. In practice, company cars, and other assets such as company phones with a telecoms subscription, public transport passess etc. are often considered to be put at the disposal of the employees free of charge.

881 See, for example, Article 8 of the Dutch VAT Act ('Wet op de omzetbelasting 1968'), under which the taxable amount is determined by 'the total amount that – or insofar the consideration does not consist of cash, the total value of the consideration that – is charged with regard to the supply goods or the services, excluding the VAT itself' (underlining by me, JB).

In my view, the EU VAT rules do not allow a single transaction to be considered twice (or: to be two separate things) from a VAT perspective. The transfer of ownership of a good, for example, can only be a taxable supply of that good from a VAT perspective if performed by a taxable person acting as such. In that case, in my view, it cannot also be a payment. Conceptually, a single transaction cannot be two whole separate things (within the same country) at the same time from a VAT perspective.[882]

Goods (or services) can be used for different purposes consecutively, or parts of the same good can be used differently at the same time, but one whole single good (or service) cannot, in my view, be the object of a taxable supply and at the exact same time be a payment for another taxable supply, even if this payment is not a taxable transaction.[883] I will elaborate on the consequences of this view in the rest of this Chapter.

Based on the above, a single transaction (in my earlier example: the transfer of ownership of a good) cannot, as a whole, be considered to be two separate transactions (e.g. a supply of a good as well as a payment). This means that, in my view, a taxable business that supplies goods and/or services as part of a 'barter transaction' can only perform one transaction, which is the taxable supply of the goods and/or services (for consideration). This is not (also) a 'payment in kind', even though that is what parties to the agreement may call it and that is what it may appear to be.

In my view, from a VAT perspective, where two taxable businesses are parties to a 'barter transaction', they in fact make two taxable supplies for consideration and the businesses settle the amounts or considerations that they have to pay by offsetting them against each other using, as I will discuss in Section 7.5, an agreed value that is the same for both supplies.

The definition of 'barter' in the dictionary is the exchange of goods or services for other goods or services without using money.[884] The fact that no money is used does in my view not have to mean that the goods are also used for payment. All it means is that the parties to the barter transaction consider the value of their respective supplies to be of equal value, whereby they (implicitly) agree to offset their monetary/cash debts so that no cash payments are required.

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882 Under the EU VAT rules, this is only different for goods that are transported/dispatched to another country. In the country of departure of the goods, this can be a(n export or intra-Community) supply and in the country of arrival this can be an import or an intra-Community acquisition.

883 The only case law I know where a single good was 'supplied' twice by a single supplier is CJEU case C-63/04, Centralan Property Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2005:773, where a business supplied a single immovable property to a purchaser and three days later to another purchaser. This is, however, different from a single transaction concerning a single object being separated into a supply as well as a payment.

884 Barter, verb: Exchange (goods or services) for other goods or services without using money. 'He often bartered a meal for drawings'. Oxford Dictionaries, free online version, last visited on 22 February 2019 (http://www.oxforddictionaries.com/definition/english/barter).

From the CJEU's older case law on barter transactions, it seems that the CJEU sometimes finds it difficult to grasp the exact operation or nature of barter transactions. In a ruling about a business that offers 'free goods' in return for people that either register as customers or that introduce other people as new customers to the business, the CJEU describes/considers this taxable person – that supplies the goods – as the recipient of a supply making payments (in kind) for the services received rather than a supplier, in at least five instances.[885]

Also, in the same ruling, the CJEU applies a reasoning for determining the taxable amount for the supply made by the taxable person that is based on the premise that the supply is a payment. Under the relevant EU VAT provisions for determining the taxable amount or consideration for a supply, the value is determined by 'everything received or to be received in return for the supply', i.e. the value of the consideration received by the supplier. Instead, the CJEU uses the value of the supply made by the supplier as taxable amount for that supply. I find that confusing, as I will now explain.

7.4.4 The value of the consideration for a supply is the amount paid by the supplier for making that supply?

As a result of what I consider the CJEU's confusion about how to qualify barter transactions, the taxable amount for supplies made by taxable persons in a barter transaction is the cost price or purchase price of these supplies.

The rationale behind this is that, because the supply is also a payment for the (supply of) goods and/or services received by the supplier, this value (of his supply, i.e. the payment) is the price that this taxable person is willing to spend on the supply he gets in return. The CJEU literally describes this as follows:

> "Where that value (the consideration received by the supplier, JB) is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the services constituting the consideration for the supply of goods (i.e. the supplier, JB) attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose. Where, as here, the supply of goods is involved, that value can only be the price which the supplier has paid for the article which he is supplying without extra charge in consideration of the services in question."[886]

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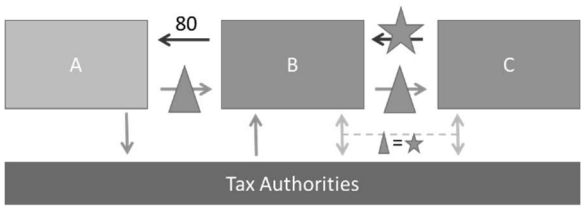
885 CJEU case C-33/93, Empire Stores Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1994:225, paragraph 13 ("…that the supply (by the taxable person, JB) … is made in consideration of …"), paragraph 15 ("…the supply of the article (by the taxable person, JB) … (is, JB) a consideration for the services received (by the taxable person, JB)…"), paragraph 16 ("… if the service (referring to the introduction of a potential client by customers of the taxable person, JB) is not provided no article is due (as payment by the taxable person for this service, JB) …"), paragraph 17 ("… since the services provided to … (the taxable person, JB) are remunerated by the supply of goods …") and paragraph 19 ("… the article which he (the taxable person, JB) is supplying … in consideration of the services in question.").

886 CJEU case C-33/93, Empire Stores Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1994:225, paragraph 19.

To me this looks a lot like the 'chicken-and-egg' problem.

Under the normal EU VAT rules, the taxable amount (or consideration) is everything received by the supplier in return for his supply.[887] The supplier will have to determine the value of what he obtains (or will obtain) in return for his supply, if what he obtained is not money. He will have to decide what the 'payment in kind' (even though I argue that from a VAT perspective there is no such thing) that he receives is worth.

Since a supplier usually has no way of knowing what his customer paid for the goods or services that he uses as payment in kind for the supply by the supplier, the supplier cannot use that value as taxable amount. In my view, imposing rules to make the buyer (the person 'paying with goods or services') disclose the purchase price of the goods or services he uses as 'payment in kind' is not desirable, because this would take away (part of) the economic benefit of bartering: parties enter into a bartering contract because they perceive the goods and/or services that they receive to be more valuable than the goods or services they offer 'in return'. Also, it may be hard to determine the cost price or purchase price of goods or services received, for example if these goods or services were produced internally by the party using them as payment, or if the goods were purchased a long time ago.[888] Besides all that, using the value of the supply for the value of the payment received for the supply assumes that no profit is made on barter transactions. I cannot believe that that should be a general rule, because this does not properly reflect the economic and commercial reality of 'normal' business transactions. Therefore, in my view, cost price or purchase price of the goods or services received in return for the supply cannot and should not be used for determining the taxable amount, despite the practical attractiveness of this method.



In the above diagram, the good supplied by B (▲) is supposed to have the same value as the good supplied by C (★), both being the purchase price of the good (▲), i.e. 80 (including VAT), because if parties would not consider the two supplies of equal value, an additional payment would be expected under normal economic and commercial circumstances. If B were a better bargainer, he might be able to obtain not one but two of the same goods from C (★★) and still only supply one goods himself (▲) with a value of 80 including VAT. If that were the case, the value of those two goods received by B would still be the same (for VAT purposes) as in a situation where B would have only managed to get one of those goods as 'payment' for his supply.

887 See Article 73 of the EU VAT Directive.

888 Assuming that the party 'paying' with these goods and/or services is under no obligation to divulge that value.

The CJEU's 'chicken-and-egg' solution, using the value of the supply made by the supplier as the value of the consideration received for that supply, as developed in its case law seems the easiest and most practical way for determining the taxable amount:

- since it is a barter transaction, the supplier of a product is also a consumer that makes a 'payment in kind' for purchasing another product
- therefore, he knows the value of his own payment, which is the value of the product he supplies
- apparently, what he pays with in kind (i.e. the supply of his product) is worth the same as what he gets back in return for his supply (the product he purchases, also being the consideration for his supply),
- the taxable amount for his supply is therefore the value (i.e. the purchase price or the cost price) of his own supply
- this means that he has to pay VAT for the supply he makes based on the value of the supply that he makes (which is deemed to have the same value as what he receives in return for that supply).

I object against this method, for the following reasons (two of which I elaborated on above).

First, in my view, from a VAT perspective a supply cannot simultaneously be a payment. It is not possible to, in one single supply concerning one whole good or service as the object of that supply, consider that single whole good or service to be the object of a taxable supply as well as a payment for a 'return supply' at the same time. There are, in my view, two supplies where the considerations are settled by offsetting the amounts against each other.

Second, under the EU VAT rules, the cost price or purchase price of the goods or services supplied is specifically used to determine the taxable amount in cases where no consideration is received, where and insofar as VAT was deducted on these costs.[889] The supplies for which this taxable amount is used, are considered an adjustment system, as described in Chapter 6. Consumption should be taxed, and therefore deducted VAT must be repaid in case of consumption where no consideration is paid. For that purpose, it makes sense to charge VAT on the purchase price or the cost of what it is that is provided free of charge.

However, this mechanism (using the purchase price or cost price of goods and/or services as taxable amount for the supply of those goods or services) should not be applied to transactions that are made for consideration. This would assume that, as a general rule, no profit is made on barter transactions. This goes against common economic sense, as well as the 'economic benefit' as a reason for bartering, both reflections of 'economic and commercial reality'.

When goods or services are not given away for free but sold at a very low price, even at a symbolic price, the taxable amount is the amount received by the supplier.[890]

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889 See Articles 74 and 75 of the EU VAT Directive.

890 Even though a symbolic price may be so low that it cannot be considered payment and therefore the supply cannot be considered an economic activity (CJEU case C-50/87, Commission of the European Communities v French Republic,

There can be reasons for a supplier to agree with a price that is (well) below the original cost of his products or services, such as relational ties between the supplier and the recipient, charitable reasons etc. The fact remains that in VAT, a subjective taxable amount is used. Member States have the possibility to revalue the taxable amount in certain cases, but that is a specific exception to the rule that the taxable amount is subjective.[891]

VAT is, in its essence, a tax on consumption. The fact that it is an indirect tax makes it hard to determine the taxable amount, as I demonstrated above, but this does not mean that the consumption tax principle should be ignored. In my view, the consumption element of VAT is more relevant than the indirect element, even though the amount of the consideration has to be determined by the recipient of this amount.

Third, if the 'consideration received' has the (same) value of (as) the price of the goods or services provided, it seems that 'bad debt relief'[892] cannot occur in cases where any goods or services were received 'in return for the supply/supplies'. I will use my earlier example, where I considered B to be a 'good bargainer'. It may become even more clear if I turn that example around: let's assume that B and C have agreed that B will supply one good (▲) and that 'in return', he will receive two goods (★★). Based on CJEU case law, the VAT due on the supply by B (the one good (▲)) is the value of the cost price of the good supplied (▲), which is 80 (including VAT). Now let's assume that it was agreed that C was to supply the two goods consecutively and that before C is able to supply the second good (★), he goes bankrupt and he will not supply it. In that case, B has received only one good (★) in return for his supply (of the one good (▲)), but because the value or taxable amount of his supply of his goods (▲) does not depend on (the value of) what he gets in return,[893] the taxable amount is still the value of (▲), which is still 80 (including VAT). Even though B received only half of what was agreed in return for his supply, it seems difficult to argue that this amount should be lowered because of what B has received in return has less value than agreed – for that value does not depend on the value of what he receives in return. Or does it?[894],[895]

In my view, there are two options for solving this dilemma that are more in line with the general principles underlying the EU VAT system, as well as with the economic and

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ECLI:EU:C:1988:429, paragraph 21), it is not considered a deemed supply, which means that no VAT is due based on Articles 16 and/or 26, but that the deducted input VAT should be adjusted instead.

891 See Article 80 of the EU VAT Directive.

892 The repayment of over-deducted VAT in cases where the

893 Or rather, what he receives in return is deemed to be of the value of the cost price or purchas price of his own supply.

894 In CJEU case C-330/95, *Goldsmiths (Jewellers) Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:1997:339, the CJEU decided that it is possible to decrease the taxable amount under the 'bad debt relief'-provision (currently in Article 90 of the EU VAT Directive) in barter transactions, suggesting to me that the value of the consideration received in return for a supply can, therefore, not be the value (in terms of cost) of that same supply.

895 I could not find any reference to the VAT consequences of bad debt relief in barter transactions in a Dutch PhD thesis on the topic of bad debt relief in VAT: B.G.A. Heijnen, *Niet-betaling in de btw (non-payment in VAT, JB)*, 2018, Wolters Kluwer, Netherlands.

commercial reality of barter transactions, neither of which is explicitly included in the EU VAT Directive or mentioned in any CJEU case law. However, the second option is positive law in at least two non-EU countries (New Zealand and Australia). I will elaborate on this in the next Section.

7.5 Two (alternative) options for determining the taxable amount in barter transactions

The first option would be that the supplier and his client actually have to agree a monetary value for each supply. In most situations where two taxable persons are involved, they will have to do this anyway because both suppliers have to issue an invoice for their supplies, mentioning the taxable amount as well as the amount of VAT due.[896] Even though that reasoning is based on a practicality it also reflects economic reality: there are two supplies that each have a value. Simply agreeing a price would therefore solve this problem. This option also acknowledges the fact that there are actually two supplies for consideration and two monetary debts that are settled between the parties by offsetting them against each other.

Based on the available case law, it seems that for barter transactions where a price (i.e. a monetary value) is agreed, this agreed value should be leading anyway,[897] as I will discuss in this Section.

However, in some barter transactions, parties may not wish to attach an actual value to their transactions, for commercial or other reasons. Then the second option could bring a solution.

The second option would be expanding the application of a specific provision in the EU VAT rules that determines the taxable amount in cases where no or not only money is used for payment. This taxable amount should in my view be the 'open market value' as described in Article 72 of the EU VAT Directive:

> "(…), 'open market value' shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax.
>
> Where no comparable supply of goods or services can be ascertained, 'open market value' shall mean the following:
> (1) in respect of goods, an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;
> (2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service."

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896 See Articles 220 and 226 of the EU VAT Directive.

897 CJEU case 230/87, Naturally Yours Cosmetics Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1988:508 (ruled on the bases of the Second VAT Directive).

In both New Zealand[898] and Australia,[899] the '(open) market value' of the goods or services supplied is used as the basis for taxing barter transactions. I could not find any background as to why this 'market value' is used in the Published Commentary to the New Zealand Goods and Services Tax Act 1985[900] nor in the Explanatory Memorandum to the Australian GST Act.[901] In practice, at least one EU Member State (at the time of writing this) also uses the 'market value' as taxable amount for barter transactions.[902]

For the second option, the open market value should be at least the purchase price or the cost price of the supply, i.e. the cost to the supplier, in case no comparable supplies can be ascertained. Therefore, I would suggest using the 'open market value' solution only in cases where parties do not (wish to) agree a value, or in cases where one of the parties (or both) cannot fully recover input VAT and one of them (or both) would benefit from an agreed price that is not the open market value. However, this would require the parties to disclose the cost of their supply, as that would be the minimum amount of the supply. This may not be deemed desirable by the parties involved. On the other hand, parties involved in a barter transaction will often 'also' provide the same or similar goods and/or services for a consideration in cash and advertise a price for that. It should, in my view, be possible to determine a taxable amount this way.[903]

Another relevant thing is that, in bartering without (additional) cash payments, it is usually assumed that both supplies have the same value. Therefore, the relevant rules should also stipulate that determining the 'open market value' of one of the two supplies should be sufficient. If the open market value of both transactions is known

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898 Under the rules of New Zealand's Goods and Services Tax Act 1985, Section 10, the value of supply of goods and services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of (a) to the extent that the consideration for the supply is consideration in money, the amount of the money: (b) to the extent that the consideration for the supply is not consideration in money, the open market value of that consideration.

899 Under the rules of Australia's A New Tax System (Goods and Services Tax) Act 1999, No. 55, 1999, Paragraph 9-75(b), the value of a taxable, where so far as the consideration is not consideration expressed as an amount of money, shall be the GST inclusive market value of that consideration. Under Paragraph 195(1) of that Act, the GST inclusive market value means the market value of the consideration or thing, without any discount for the amount of GST (if any) payable on the supply.

900 Published Commentary to the Goods and Services Tax Act 1985, Public Information Bulletin Volume 143, February 1986.

901 The Parliament of the Commonwealth of Australia, House of Representatives, 1998, A New Tax System (Goods and Services Tax) Bill 1998, Explanatory Memorandum.

902 In the UK, barter transactions are treated as two separate supplies where the suppliers must both account for VAT on the amounts they would each have paid for the goods or services if there had been no barter and they had been paid for with money, see HMRC's Guidance on VAT: part-exchanges, barters and set-offs, 1 July 2014, accessible online at https://www.gov.uk/guidance/vat-part-exchanges-barters-and-set-offs, last accessed on 22 February 2019.

903 For an opposite view, see Millar, Rebecca M., Illusory Supplies and Unacknowledged Discounts: Vat and Valuation in Consumer Transactions, British Tax Review, No. 2, pp.153-184, 2003 and Deborah Butler, The usefulness of the `direct link' test in determining consideration for VAT purposes, (2004) 13 EC Tax Review, Issue 3, pp. 92–102.

and if these values are not the same, I would argue, from a perspective of 'economic reality' and 'economic benefit' that the value should be determined by adding the two values and dividing them by two. That way, the price reflects the result of bargaining where parties have reached an agreement that is equally acceptable to both (financially). This does not take into account the actual bargaining power or bargaining skills of the parties involved, but in my view, it still better reflects the economic and commercial reality of barter transactions than applying the current EU VAT rules, as I have described above.

In my view, the two options I present as alternatives to the current, positive EU VAT treatment of barter transactions are proportionate to the issues I identified with the current VAT treatment. Charging VAT on the purchase price or cost price of goods or services in a bargain transaction is not a reflection of the economic and commercial reality of such transactions. Parties should be able to agree a (cash) price for their supplies and if not, the concept of 'open market value' is an existing Union concept. Applying these options would bring the VAT treatment of barter transactions in line with economic and commercial reality in what I consider a relatively easy and straight forward manner.

As mentioned, the EU VAT Directive already contains a provision that allows Member States to adjust the consideration from the agreed taxable amount to the open market value in cases where parties are related. As in supplies for a consideration in cash, related parties may also be inclined to attribute a value to a transaction that is not the open market value in barter transactions. I would therefore suggest applying this open market value option[904] also to barter transactions, but to not leave this at the discretion of Member States (i.e. to not make it an 'option').[905],[906]

This option, i.e. applying the open market value if parties do not specifically agree a value or where the agreed value is not the open market value, also works if there are actually two (separate) supplies that are made for a certain consideration (i.e. the 'open market value' of each supply, in case both suppliers are taxable persons) and that the two considerations are, again, settled by offsetting the amounts due against each other.

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904 By which I mean the option for Member States to use the open market value as taxable amount instead of the amount agreed by parties to the transaction.

905 This would also avoid any problems relating to cross border barter transactions, where one Member State has decided to implement the 'open market value' rules and the other Member State has not.

906 Since I don't consider 'barter transactions' and 'cash transactions' to be similar, they don't have to be taxed the same under the principle of neutrality.

The above solutions are supported by the CJEU's Naturally Yours case.[907],[908] In this case, a business agreed to sell products at a (discounted) price below the advertised specific wholesale price on the condition that the purchaser performed a specific service in return. If the purchaser fails to perform that service, the advertised specific wholesale price would have to be paid. The CJEU ruled in this case that parties apparently agreed that the value of the agreed specific service performed in return for the discount (the supply of the product in return for the payment of an amount below the wholesale price) was the difference between the wholesale price and the (discounted) price actually paid. This implies that if parties agree a price, part of which is paid in money and part of which is paid in kind, the value of the payment in kind is apparently the difference between the agreed price and the monetary consideration. I do not see why this should be different for situations where the payment is made fully in kind: if parties agree a price and 'payment is made in kind', the agreed price should also be considered the amount received in return for the supply, and therefore the taxable amount.

As stated above, businesses normally sell goods or services for a certain price, which is usually above cost price or purchase price (assuming that businesses want to make a profit, that they are not bound by certain pricing regulations etc.). This, in my view, implies that the agreed sales price of a product or service, or the open market value thereof, and not the cost price, should be used as the taxable amount when no price is agreed.

7.6 Deduction of VAT in barter transactions

In a barter transaction between two taxable persons, as in any taxable transaction, payments are made for purchasing goods or services. The taxable business purchasing goods or services for its taxed business activities will be allowed to deduct the input VAT included in the payment for those purchases.[909],[910] The amount of the VAT deduction is the actual VAT amount paid.[911] I have not found any CJEU case law on determining the deductible VAT amount in barter transactions, but because the CJEU considers the supply to also be a payment, I assume that under the current rules based on CJEU case law, the deductible VAT amount is based on the value of the supply.

As I mentioned before, from a VAT perspective, barter transactions are two supplies that are each made for (the same) consideration, where the consideration is (implicitly) settled between the suppliers. My suggested solutions for determining the

907 CJEU Case 230/87, Naturally Yours Cosmetics Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1988:508 (ruled on the bases of the Second VAT Directive).

908 See, in support, Deborah Butler, 'The VAT treatment of goods as non-monetary consideration: the approach taken by courts in the United Kingdom in the light of the general principles established by the European Court of Justice' (2002) 11 EC Tax Review, Issue 4, pp. 191–291.

909 This can be different when the purchase is (also) used by the taxable business for VAT exempt activities or activities that are considered non-economic activities.

910 See Articles 167-168 of the EU VAT Directive.

911 See Articles 168 and 185 of the EU VAT Directive.

taxable amount, i.e. to either agree on a price or to let the price be equal to the 'open market value' of the supply. In either case, the suppliers (who are also the purchasers) know the agreed price in money (which they have (implicitly) settled) and therefore they can easily calculate the amount of deductible VAT that is included in that amount.

From a VAT deduction perspective, it is also relevant to ensure avoiding distortion of competition when parties to a barter transaction do not have the right to full VAT deduction. By bartering, a risk exists that such parties could obtain goods of a higher value than the ones bartered at no additional VAT cost. Under the current rules, this can only be avoided if the barter is treated as two separate supplies (as I will demonstrate in the example below), because if the input VAT amount would be based on the cost of the good supplied (as seems to be suggested in CJEU case law), the VAT cost (the amount of non-deductible VAT) would not reflect the VAT that should be levied on the actual value of the consumption (as I will demonstrate in the example below).

Currently, the EU VAT rules do not contain a rule like that for avoiding distortion of competition. However, assuming that the suggested rules for determining the taxable amount for barter transactions as described were to be implemented, distortion would also be avoided because the amount of (non-)deductible VAT would be based on the suggested taxable amount. I refer to the examples below.

It is relevant that the taxable amount, and therefore the amount of deductible VAT, is the same for both parties involved. I will demonstrate this with an example.

> Example 1
> Company A and Company B can both fully deduct input VAT.
> Company A owns a good (A), which it wants to swap for another good (B), owned by Company B. The costs of Good A (excluding VAT) is 100. The cost of Good B is 150 (excluding VAT). The standard VAT rate, applicable to both supplies of goods, is 20%.
>
> No cash payments will be made between Company A and Company B. Based on the above, Company A will have to remit VAT to the amount of 10 to the Tax Authorities, whereas Company B will have a VAT claim to the same amount. By bartering, the VAT positions of both companies towards the Tax Authorities change.
>
> Under the current rules based on CJEU case law, if neither business advertises or agrees on a specific price or value for its supply, but just 'trade' the goods, Company A will have to remit a VAT amount of 20 to the Tax Authorities (20% of 100). Under the relevant VAT rules, Company B will have to issue an invoice for its supply, which Company A needs to be allowed VAT deduction (see Article 178(a) of the EU VAT Directive). That invoice will mention the taxable amount regarding the supply made by Company B, i.e. 150, and a VAT amount of 30 (20% of 150). Company A will be able to deduct that VAT amount of 30 from the VAT amount payable of 20, leaving an amount of 10 to be claimed from the Tax

Authorities, assuming that the transaction values are settled by offsetting the amounts due with each other. The opposite applies to Company B, who will offset a VAT amount payable of 30 with a deductible amount of 20. The total net result for the tax authorities is zero.

If the businesses were to use the same taxable amount, say 125 (100 + 150 / 2), neither Company A nor Company B would have any amounts claimable or payable from or to the Tax Authorities. This in my view better reflects the economic reality of the transaction, where neither business makes a payment because it is assumed that under the barter transaction, equal values are traded.

Example 2
In the same example, if Company A would only have a general VAT deduction right of 50%, this would have the following effect:

Company A would have purchased good (A) for 120 and would have been able to deduct 50% of the input VAT amount of 20, i.e. 10. The VAT cost of this good (A) would be 10.

Subsequently, because good (A) would be use good (A) for a fully taxed supply (the supply to Company B), Company A would be able to deduct the remaining non-deducted VAT in full. Assuming that good (A) would not have been used for business purposes yet, the VAT cost of good (A) would then come to 0.

As a result of the barter with Company B (the swap of good (A) for good (B)), Company A would be in the possession of a new good (good (B)) with a value of 150 (excluding VAT) without having to make an additional payment. If Company A would have sold goods (A) for cash and would have purchased good (B) for cash as well, Company A would have had to pay 180 to Company B (150 + 20% VAT). Of the 30 VAT, 15 would have been deductible. The VAT cost of good (B) would have been 15, making the total cost of good (B) for Company A 165 (150 + 15).

However, Company A did not pay 150 (excluding VAT) for good (B), it bartered it for good (A) with no additional payment. Through its own 'inner workings', using its business skills, negotiating skills and power of persuasion, it was able to obtain a good (good (B)) with a higher value than good (A) at no additional cost. However, through this business transaction, value was added, and Company B, by performing this business transaction, was able to obtain or purchase more (good (B)) than it originally had (good (A)). The total cost of good (B) for Company A is 110 (including 10 non-deductible VAT) (and not 165).

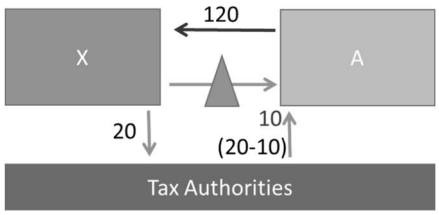
In my view, this transaction (obtaining a business asset without a VAT cost by a business that cannot fully deduct VAT) should be subject to VAT under the same rationale[912] that ensures taxation of the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed,

[912] The rationale is to avoid distortion of competition, see Article 27 of the EU VAT Directive.

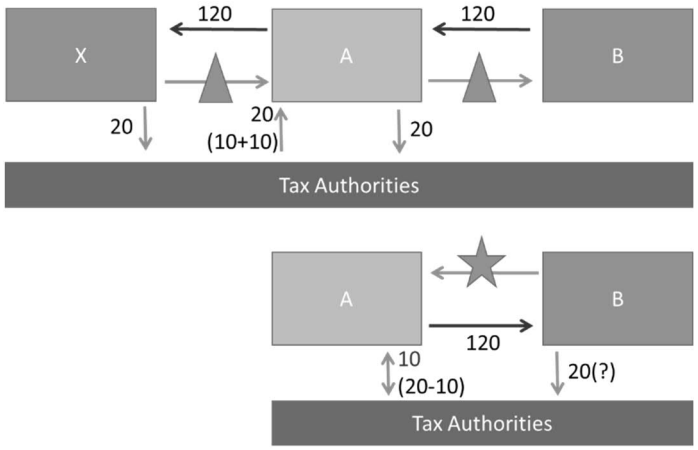
purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible[913] and the supply by a taxable person of a service for the purposes of his business, where the VAT on such a service, were it supplied by another taxable person, would not be wholly deductible.[914]

Because, in the example, Company A and Company B barter the relevant goods without additional payment, economic reality would allow the assumption that both companies consider the transaction to be of (at least) the same value. Applying my suggestion to set the agreed amount 'in the middle' of the values of each good, the taxable amount for each supply would be 125 (excluding VAT). For Company A, this would mean that a VAT amount of 25 (20% of 125) would be due on the supply of good (A) to Company B, and that Company A would be able to deduct 50% of the VAT paid on the purchase of good (B), i.e. 12.5 (50% of 25). This would bring the total cost for Company A of good (B) to 112.5. This is 2.5 higher than the (original) cost of good (A), which I – as explained – consider justified under the working of the relevant VAT principles. In pictures:

Original purchase:



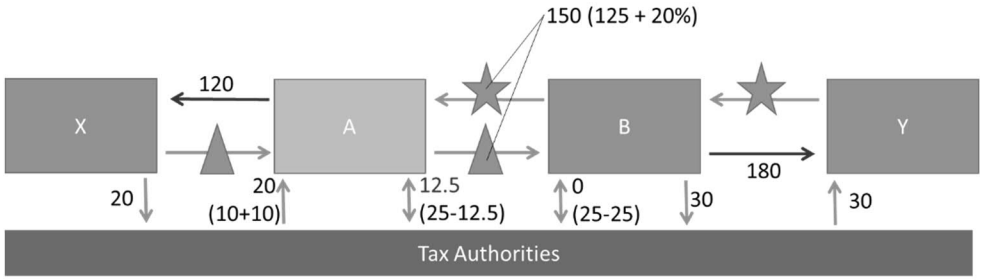
Barter as two separate transactions:



913 Article 18(a) of the EU VAT Directive.

914 Article 27 of the EU VAT Directive.

Barter using the 'average' cost as taxable amount and for VAT deduction:



7.7 VAT and barters between a taxable person and a non-taxable person

So far, I mainly focussed on barter transactions between two taxable persons. I've come to the conclusion that in those cases, in my view, each taxable person makes a taxable supply of goods or services for consideration and that parties (implicitly) agree that the considerations are settled. I will now examine whether the solutions for determining the taxable amount that I presented earlier also apply to barter transactions between a taxable person and a non-taxable person.

The only party to this type of barter transaction that is affected by the VAT consequences of the transaction is the taxable person. In my view, the supply of a good or service cannot also be considered a payment for a supply. This also holds in this scenario, since there is no conceptual difference between paying for a supply by a taxable person and a supply by a non-taxable person. Therefore, in my view, the supplier and the recipient should still either agree on a price or use the 'normal value' as a taxable amount for the transaction.

Because the taxable business purchases a good or service from a non-taxable person, the supply made by that non-taxable person is not subject to VAT. Therefore, no VAT can be deducted by the taxable business. Therefore, determining a deductible amount for the transaction made by the natural person is irrelevant/does not apply.[915]

7.8 Barter transactions between related parties (emotional benefit)

The 'emotional benefit' can be a reason for a taxable person/business to accept terms in a barter transaction (or any transaction) that it would normally not accept. This often occurs in cases where the business and the other party to the transaction are somehow related. The example I gave earlier was of a father sponsoring the football team of his son by providing them with football shirts in return for his company's name and logo being visible on those shirts. The fact that a relationship exists may

915 This is different if the purchasing business is a trader in second hand goods that applies the 'margin scheme', where VAT is calculated on the margin made by the trader, calculated by deducting the purchase price (taxable amount of the sale by the natural person) from the sales price, see Articles 312-325 of the EU VAT Directive.

cause the parties to the agreement to not apply an 'open market value' to the transaction. If this is the case, Member States have the possibility to adjust the taxable amount for this transaction in certain cases, mainly where one of the parties does not have a full VAT recovery right.[916]

7.9 Are all 'barter transactions' involving a taxable person acting as such VAT taxable transactions?

In my view, not all barter transactions involving taxable persons acting as such need to be subject to VAT. As the CJEU has repeatedly stated, for a transaction to be subject to VAT, it follows from the relevant provision in the EU VAT Directive that the consideration for the provision of a supply must be capable of being expressed in money. Also, this consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria.[917] There has to be a 'direct link' between the supply and the consideration.[918]

In my view, there can be cases where this direct link is missing. For example, a business offering a 'conditional discount', e.g. a shoe shop offering a discount if customers hand in a pair of old shoes, is not a 'barter transaction' in economic and commercial reality. Another example of such a 'conditional discount' is a business offering a 10% discount to the first ten customers to come in at a certain day. The recipients of the discount will have to do something to be granted the discount, but this 'something' is not considered to be 'in return for the supply' but, as mentioned, a condition for the discount. There is no direct relation between the condition and the value of the supply. This becomes more clear if, instead of showing up at a designated time, people get that discount if they come to a shop wearing a specific outfit/costumer or accessory, of when people have to make a puzzle, come up with a slogan or hand in a colouring picture. In my view, these are all examples of barter transactions in the broadest sense of that concept. Whether the transaction (i.e. the supply made by the taxable person) is subject to VAT depends on the factual circumstances. There has to be a direct link between the supply ('granting a 10% discount') and the consideration ('dressing up'). This is not the case for certain 'conditional discounts'.

In my view, as soon as the business can establish the actual value of the discount, which it should at least be able to do as soon as the discount is actually granted, the cost price of the supply is known. But in my view, in a barter transaction, the business should either mention the price for its supply (i.e. put a price on granting a 10% discount) or apply the 'open market value' of granting this discount as a taxable amount for this transaction. This should be possible in the case of a 10% discount actually granted on the same day that the 'payment' is received. But this could be

916 See Article 80 of the EU VAT Directive.

917 See, for example, CJEU case 154/80, Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA, ECLI:EU:C:1981:38, paragraph 13.

918 See, for example, CJEU case C-246/08, Commission of the European Communities v Republic of Finland, ECLI:EU:C:2009:671.

more difficult, or impossible, if for example a '5% discount on all purchases in the next calendar year' is granted. And the link between the supply and the payment gets even more blurred in a very common promotional activity in, for example, the Netherlands: the barter transaction where customers allow a business (e.g. a supermarket) to keep track of their purchasing so that it can use that information for targeted commercial activities, in return for certain discount offers (e.g. 'exclusive deals').[919]

It seems possible that the supply and the consideration in these types of barter transactions lack a sufficiently direct link to be considered subject to VAT. As mentioned, in my view this is definitely the case if the 'payment' as such is of no (real) value to the supplier but should be considered a condition to be eligible for the free supply or discount. This is different where the payment has an actual economic value to the supplier, as in the example of the personal purchasing data of supermarket clients. In that case, in my view, the business should put a value on the supply (in this example: the eligibility to specific discounts and 'exclusive deals') and remit VAT for this supply to the tax authorities.

However, in order for that type of barter transaction to be subject to VAT, it should be based on an agreement between parties under which a supply is agreed but also a specific consideration is agreed to be paid in return for that supply.

7.10 Bartering and promotional activities: can 'customer loyalty' or 'user data' be consideration for a transaction under the current EU VAT rules?

7.10.1 Introduction

As mentioned before, some argue that 'there's no such thing as a free lunch'[920] or that nothing is free when it comes to business transactions. The phrase is said to have been popularised by Milton Freedman,[921] a Nobel-prize winning economist who published a book with the same title.[922] For this section, the phrase is relevant because it implies that businesses will not actually give away anything for free because they always expect something in return. I will establish whether, from a VAT perspective, 'customer loyalty' and 'user data' can be treated as consideration for a supply. After all, customer loyalty and user data must be worth something if a business is prepared to reward getting access to it?

For 'something in return' to qualify as a consideration for VAT purposes, there has to be a direct link between a supply and the consideration, which implies an agreed

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919 See, as an example, the Dutch supermarket chain Albert Heijn's Bonuskaart system, only available in Dutch, on line: http://www.ah.nl/bonuskaart (last visited on 22 February 2019).

920 See, for example, the Opinion of Advocate General Sharpston in case C-371/07, Danfoss A/S and AstraZeneca A/S v Skatteministeriet, ECLI:EU:C:2008:590, paragraph 1.

921 William Safire, On Language; Words Out in the Cold, New York Times, 14 February 1993, accessed on-line at http://www.nytimes.com/1993/02/14/magazine/on-language-words-out-in-the-cold.html on 22 February 2019.

922 Milton Friedman, There's No Such Thing as a Free Lunch, Open Court Publishing Company, Chicago, USA, 1975.

reciprocal performance based on a legal relationship, and the consideration must be capable of being expressed in money.[923] If there is a supply for consideration, the supply is taxed to the amount received or to be received by the supplier in return for his supply. If the consideration is not or not entirely in money, the consideration is determined either by the advertised value of the supply (minus the consideration in money, if any)[924] or, in absence of an advertised price, the price paid for the supply made in return.[925]

If a business makes a supply of goods free of charge, this supply can still be subject to VAT, even if the supply was made for business purposes.[926] This is different for services.[927] If the 'free' supply is a supply of goods, it is only taxable insofar as the VAT on those goods or the component parts thereof was wholly or partly deductible.[928] This is not required for the supply of 'free' services – any service provided for no consideration is subject to VAT, except where that supply is made for business purposes.[929] These provisions only apply if the supply is made within the scope of the system of VAT.[930] The tax status of the recipient is irrelevant.[931] Also, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.[932] This means that, as a main rule, when a supply is made free of charge for consumption purposes, VAT will be due. The taxable amount for these supplies is the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place, where it concerns goods,[933] or the full cost to the taxable person of providing the services, where it concerns services.[934]

This means that in many cases there is no difference in VAT treatment between making a supply of goods for consideration in kind to loyal customers that are private

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923 See CJEU Cases Case 154/80, Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA, ECLI:EU:C:1981:38, par. 13 and C-198/99, Town & County Factors Ltd and Commissioners of Customs and Excise, ECLI:EU:C:2001:494, paragraph 18.

924 See CJEU case C-230/87, Naturally Yours Cosmetics Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1988:508.

925 See CJEU case C-33/93, Empire Stores Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1994:225.

926 CJEU case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203, paragraph 22.

927 See Article 26 of the EU VAT Directive, that only allows taxation of services made free of charge if they are supplied for purposes other than those of the business.

928 See Article 16 of the EU VAT Directive.

929 See Article 26 of the EU VAT Directive.

930 See CJEU case C-515/07, Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën, ECLI:EU:C:2009:88, paragraphs 38 and 39.

931 See CJEU case C-581/08, EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:559.

932 See Article 16 of the EU VAT Directive.

933 See Article 74 of the EU VAT Directive.

934 See Article 75 of the EU VAT Directive.

individuals or making the same supply for free: VAT is due on the purchase price of the goods if they have no advertised value for which they can be bought. This should also apply to situations where a consideration in kind is paid for the supply of a service, because for those supplies the taxable amount must correspond to the amount which the supplier is prepared to spend for that purpose, and for the provision of services 'free of charge' the taxable amount is 'the full cost' of providing the services, which, in my view, is the same amount.

However, situations exist where there is a difference between the VAT treatments of a supply of goods for free and a supply of goods for a consideration in kind. Some examples are:

- Supplies made to other businesses.
  For these supplies the supplier will have to issue an invoice mentioning the value of the goods or services supplied if the supply is made for consideration. That value will be the taxable amount. The business purchasing the goods or services may be able to deduct the VAT due on the supply if he paid a consideration.
  This is not the case if the supply is made for free. In that case, the taxable amount will be 'the cost' of the goods (or, in exceptional cases, services) supplied.[935] In that case, the business receiving the free supply cannot deduct any VAT.
- Supplies of goods or services with an advertised value, that can be obtained by paying part of that value in money and the rest either in kind or for nothing.
  In the first case, if 'loyalty' is rewarded in collectible units and these units can be used to 'pay' for the difference between the advertised value of the goods or services and the cash payment, the taxable amount will be the advertised value of the goods or services, which means that the value of the units that represent 'loyalty' is equal to the difference between the advertised value of the goods or services and the payment in money.[936]
  In the second case, if 'loyalty' is not a consideration, the only consideration received by the supplier of the goods or services is the money. The difference between the advertised value and the money received is a discount[937] and the taxable amount is the money actually received by the supplier.[938]
- Supplies of goods with no advertised value, where the VAT on those goods or component parts thereof was not fully deductible.
  If such goods are supplied in return for loyalty and loyalty is a consideration, the supply is a taxable transaction and the taxable amount will be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place, where it concerns goods.[939] If loyalty is not a

935 See Artt. 74 and 75 of the EU VAT Directive.

936 See CJEU case C-230/87, Naturally Yours Cosmetics Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1988:508.

937 See Art. 79(b) of the EU VAT Directive.

938 See Art. 73 of the EU VAT Directive.

939 See Article 74 of the EU VAT Directive.

> consideration and the goods are supplied free of charge, no VAT is due because this is not considered a transaction that is subject to VAT.[940]

It is, therefore, relevant to establish whether or not 'loyalty', (access to) customer data' or any other customer action can be qualified as a consideration in kind. In my view, it can be, but it is not always the case.

7.10.2 Loyalty or customer data as consideration for supplies from an EU VAT perspective?

Promotional activities often have specific rules.[941] For example, only customers that actually purchase specific goods or services, often for certain amounts, will receive 'loyalty points' (often related to the amount of money spent). Also, customers may have to provide suppliers with detailed personal information, or data about their use of websites, search history or other customer data, which can be used by businesses for specific marketing purposes, sometimes targeted on a personal level. This information (customer data) has a certain value, which can be considered consideration for the supply of goods or services.

However, under the EU VAT rules (as laid down in case law), this reciprocal performance has to be based on a legal agreement between the parties involved. In my opinion, actively entering/participating in a loyalty scheme by acknowledging that certain rules apply, e.g. with regard to the amount and/or the nature of the purchases that a customer has to make in order to be entitled to receive a 'free' gift or a discount on the next purchase, constitutes a legal agreement. Whether or not the premium/loyalty goods and/or services qualify as 'free' (i.e. not for consideration), as supplied in return for 'loyalty' or as paid for with part of the consideration for the main supply depends on a number of factors which I discussed in Chapter 3.

In order to substantiate my view that customer data can be a consideration for a supply, I will now discuss a selection of relevant CJEU case law and opinions from Advocate-Generals to the CJEU on this topic. I will discuss this case law in chronological order of publication. In literature about this topic, both outcomes (customer data can be consideration for VAT or it can not) can be found. The authors use the same CJEU case law as I will now discuss, with the emphasis on case law about whether or not a direct link exists between the 'payment' and the supply.[942],[943]

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940 See Article 16 of the EU VAT Directive.

941 By rules I mean terms and conditions.

942 For literature in favour of considering the making available of customer data, see S. Pfeiffer, VAT on "Free" Electronic Services?, 27 Int'l VAT Monitor 3 (2016), Journals IBFD and (from the same author) S. Pfeiffer in Lang et al (Eds.), CJEU - Recente Developmens in Value Added Tax 2017 (2018), p. 132-140 (Comments on "Free" Internet Services). He makes reference to a lot of German langage literature on this topic that I have not accessed since I don't have sufficient command of the German language.

943 For an example of literature where the author does not consider customer data to be consideration (from an EU VAT prespective) for a supply, see M. Lamensch in Lang et al (Eds.), CJEU - Recent Developmens in Value Added Tax 2017 (2018), p. 105-131, Section 3.3: "Free" Internet Services.

In his opinion regarding the CJEU Empire Stores-case, in which people that introduced themselves or another person as a new customer to Empire Stores, Advocate General Van Gerven held the following:[944] "What is the advantage, and hence the consideration, received by Empire Stores? Under the 'self-introduction' scheme that advantage consists in two elements: (i) the obtaining of personal (...) information concerning the customer (...), in relation to which the national court states that such information has an economic value (...); and (ii) the serious chance that the customer introducing herself, induced by the gift, will order catalogue goods from Empire Stores, thus enabling the latter to extend its clientele. In the case of the 'introduce-a-friend' scheme Empire Stores receives the same advantages, (...)." and "(...) The essential point is that the advantage received by Empire Stores had an economic value for it. (...) As the national court observes in its provisional judgment, the value of the introduction unquestionably had a subjective value for Empire Stores, since it was prepared to give for it an article for which it had paid the cost price."

In that same case,[945] the CJEU held the following: "It is clear from the description of the schemes used by Empire Stores (...) that the supply of the article without extra charge is made in consideration of the introduction of a potential customer (...)", "The link between the supply of the article without extra charge and the introduction of a potential customer must be regarded as direct, since if the service is not provided no article is due from or supplied without extra charge by Empire Stores."[946] In my view, the same should apply if introducing a (potential) customer is not rewarded by a payment in kind, but with vouchers (e.g. stamps) that can be exchanged for goods or services.

The Kuwait Petroleum case concerns the VAT treatment of 'free gifts', supplied as part of a scheme, using 'stamps', for the promotion of sales of fuel at petrol stations. In this case, the UK Tax Authorities (the Commissioners) had argued before the local courts that "if any consideration had been paid, it was of a non-monetary kind".[947] This issue was, however, not included in the questions referred to the CJEU. A reason for this could be that, as I demonstrated above, from a VAT perspective it would not have made a difference whether the gifts were actually supplied for free or for a consideration of a non-monetary kind. In this case, Kuwait Petroleum argued that part of the fuel price paid by its customers should be considered consideration for the supplies of the 'free' goods, as a result of which no (additional) VAT would have to be paid/remitted on the supply of these goods by Kuwait Petroleum. The CJEU disagreed

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944 Advocate General Van Gerven in case C-33/93, Empire Stores Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1994:106, paragraphs 15 and 18.

945 CJEU case C-33/93, Empire Stores Ltd and Commissioners of Customs and Excise, ECLI:EU:C:1994:225, paragraphs 13 and 16.

946 This also implies that if a person would introduce new members on a regular basis, for the purpose of obtaining income therefrom on a continuing basis, can become a taxable person. In the same sense, see U.E. Tromp, De klant is ondernemer!, BTW Brief 1994, nr. 6, blz. 4-5 and J. Bijl en A. Sanders, Bloggen en Vloggen: #btw?, BTW Brief 2016/93.

947 Opinion of Advocate General Fennelly in case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1998:342, paragraph 13.

with Kuwait Petroleum on this point.[948] The Commissioners' view supports my view that also 'loyalty' may be considered to be of value, or a consideration for a supply.

The third case that I consider relevant in this respect concerns a payment made by a landlord to a future tenant. In this case, the CJEU held[949] that "(…) a (…) person who only pays the consideration in cash due in respect of a supply of services, or who undertakes to do so, does not himself make a supply of services (…). It follows that a tenant who undertakes, even in return for payment from the landlord, solely to become a tenant and to pay the rent does not, so far as that action is concerned, make a supply of services to the landlord. (…) However, the future tenant would make a supply of services for consideration if the landlord, taking the view that the presence of an anchor tenant in the building containing the leased premises will attract other tenants, were to make a payment by way of consideration for the future tenant's undertaking to transfer its business to the building concerned. In those circumstances, the undertaking of such a tenant could be qualified, as the United Kingdom Government in essence submits, as a taxable supply of advertising services." From this case, it is clear that just being a customer is not of any value in the sense that it can be considered a consideration for a supply. There has to be more. In my view, being more than 'just a customer' or 'someone that is prepared to pay the agreed price for a supply', e.g. being a loyal customer by agreeing to repeatedly make purchases from the same business or of the same brand, could be considered more than 'being just a customer'. The fact that a customer is loyal may have a value, which can possibly lead to a reciprocal transaction, where this loyalty is rewarded, and which may constitute a supply for consideration (in kind). But this has to be based on a legal agreement. I note that not all rewards for loyalty that are based on a legal agreement are supplies for a consideration. For example, volume discounts can be considered a reward for loyalty, but the difference between the original or full price and the price after deduction of the (volume) discount is, in my view, not subject to VAT – it is not 'paid in kind'.[950] The required volume is merely a condition for obtaining the discount. Being a loyal customer is not a supply. This could only be different under very specific circumstances.

Another requirement for 'something in return' to qualify as a consideration for VAT purposes is that the consideration is capable of being expressed in an amount assessed in money. In the words of the CJEU: "(…) it follows from the use of the expressions "against payment" and "everything received in return" first that the consideration for the provision of a service must be capable of being expressed in money, which is further confirmed by Article 9 of the Second Directive which stipulates that "the standard rate of value-added tax shall be fixed … at a percentage of the basis of assessment", that is to say at a certain proportion of that which constitutes the consideration for the provision of services, which implies that such consideration is

948 CJEU case C-48/97, Kuwait Petroleum (GB) Ltd and Commissioners of Customs & Excise, ECLI:EU:C:1999:203.

949 CJEU case C-409/98, Commissioners of Customs & Excise and Mirror Group plc, ECLI:EU:C:2001:524, par. 26 and 27.

950 This is different from the facts in CJEU case C-230/87, Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise, ECLI:EU:C:1988:508, where a discount was granted in return for a speficif supply of an agreed service, and the value of that service was considered a 'payment in kind' for the 'discounted' product in addition to the (discounted) cash price.

capable of being expressed in an amount assessed in money; secondly that such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria".[951] It may prove difficult to attach an actual value to customer data or loyalty. On the other hand, only a taxable person making a supply that is subject to VAT will have to determine the value of his supply. This means that only where customers that are taxable persons are rewarded for granting access to their user data, the valuation issue becomes relevant. This would also mean that these businesses should issue an invoice for the provision of access to their user data and charge and remit VAT on those services.

In some cases, it may be more clear that granting access to customer data should be qualified as a consideration for a supply (of the use of software, for example). For example, where a user that wishes to be granted access to a specific website or app can choose between targeted advertisement based on his personal user data or no advertisement at all in return for the payment of a specific fee, the granting access to customer data should, in my view, clearly be considered consideration for the access or use of the software (website, app or other) if no access to the service is granted without access to or use of the customer data.[952]

In my view, because customer data have a value for the businesses that accept this data in return for the use or access of their software, economic and commercial reality is that this should be treated as a barter transaction from an EU VAT perspective, even if determining the value of each supply (for determining the taxable amount under the current, positive, EU VAT rules) may prove difficult.

7.11 Conclusion

In this Chapter, I have examined barter transactions from a VAT perspective. I have come to the conclusion that I do not agree with the way the CJEU looks at barter transactions, where they consider a supply to be a payment at the same time. In my view, under the EU VAT system, this is not possible. I think that a barter transaction between two taxable businesses should be treated as two supplies for consideration, where the payments are (implicitly) settled. This also allows the businesses to easily assess the amounts of deductible VAT regarding these transactions. If the businesses won't agree on a price for the barter transaction, the 'open market value' of the transaction(s) should be used to establish the taxable amount (as well as the deductible VAT amount). In my view, the same taxable amount should be applied in a barter transaction for both sides of the transaction (i.e. for the supplies made by suppliers). This is in line with the economic and commercial reality of such transactions, or at least more in line than the current VAT treatment is.

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951 See CJEU case 154/80, Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA, ECLI:EU:C:1981:38, paragraph 13.

952 This example was taken from S. Pfeiffer, VAT on "Free" Electronic Services?, 27 Int'l VAT Monitor 3 (2016), Journals IBFD.

When a ‘payment in kind’ for a supply of goods or services has no real economic value but where it is more a condition for qualifying for a discount or a supply, the supply is not considered a barter transaction because, the ‘payment in kind’ is not the consideration for a supply. Where the ‘payment in kind’ does have an (agreed) economic value, businesses should apply the above rules for determining the taxable amount (and, if applicable, the amount of deductible VAT).

If the price for a barter transaction is affected because the parties to the transaction are related and (at least) one of them does not have the right to fully deduct input VAT, EU Member States should be allowed to disregard the agreed price for the (barter) transaction and to use the ‘open market value’ of the supply as taxable amount.

Also, granting access to or allowing the use of user data or customer loyalty can be consideration for a supply from an EU VAT perspective.

8 Goods and services as prizes

In this Chapter, I will investigate the VAT treatment of giving away goods and services as prizes, for example to winners of a lottery. At first sight, these types of transactions could be construed as 'conditional supplies free of charge' but also as species of 'barter transactions'. That is why I examine these types of transactions after researching those topics (Bartering in Chapter 7 and The VAT treatment of supplies for no consideration in Chapter 6), just before the last chapter where all findings and views culminate, keeping in mind that vouchers can also serve as prizes. One of the most famous childrens' books in the world is about a voucher that was given away as a prize, and where that voucher entiled the holder to a supply of a (composite) service: Roald Dahl's 'Charlie and the Chocolate Factory'.[953] In the book, a limited number of vouchers, called 'Goldel Tickets', were hidden inside the packaging of confetionary products made by a chocolate manufacturer: Mr. Wonka's Chocolate Factory. The winners of this contest, or the people that found the Golden Tickets, were allowed a tour of the factory and to bring a guest. A great example of a promotional activity involving vouchers, as well as a great source of entertainment.

In the previous Chapters, I have discussed the direct link between a payment or consideration and a supply and how to determine the taxable amount for a supply, whether this is a supply made free of charge, as part of a barter transaction, as part of a multiple-element transaction or just for consideration. A number of relevant questions that are specific to giving away good or services as prizes, need to be answered in this chapter:

- Can the VAT incurred on the purchase of the prizes be deducted?
- If so, does this deduction need to be adjusted when the prizes are granted?

Another relevant question is how to determine whether a lottery is actually organised for free, especially if 'contestants' have to complete a puzzle or perform something else. As I explain in Chapter 7, in my view the feats performed by these contestants should generally be considered as conditions for entering the contest (e.g. the lottery) rather than a consideration in kind paid in return for entering the competition (i.e. the lottery).

8.1 Deduction of VAT – general

The VAT deduction system is meant to relieve businesses entirely of the burden of the VAT payable or paid in the course of all their economic activities. Based on consistent CJEU case law, the EU VAT system consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT.[954]

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953 Roald Dahl, Charlie and the Chocolate Factory, Penguin Books Ltd, 2014.

954 See, to that effect, CJEU cases C-268/83, D.A. Rompelman en E.A. Rompelman-van deelen, te Amsterdam, and Minister van financiën, ECLI:EU:C:1985:74, paragraph 19, C-37/95, Belgische Staat v Ghent Coal Terminal NV,

To give rise to the right to deduct VAT, the goods or services acquired must have a direct and immediate link with the output transactions which give rise to the right to deduct.[955] In principle, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary before a taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement.

8.2 A direct and immediate link

According to the fundamental principle which underlies the VAT system, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components.[956] It follows from that principle, as well as from the rule that, in order to give rise to the right to deduct, the goods or services acquired must have a direct and immediate link with the taxable transactions, that the right to deduct the VAT borne by those goods or services presupposes that the expenditure incurred in acquiring them is part of the cost components of the taxable transactions. That expenditure must therefore form part of the costs of the output transactions which use the goods and services acquired.[957] Beelen refers to this rule as 'the rule of on-charged costs'.[958] The CJEU has since clarified that costs do not have to actually be included in the price of specific taxed output for the VAT on those costs to be deductible.[959]

If costs of goods or services are not directly and immediately linked to taxed output in the above sense, those costs can still form part of a taxable person's overheads. As such, these costs are considered cost components of the economic activity of the business as a whole. The costs of these goods and services have a direct and immediate link with the whole economic activity of that taxable person.[960] The VAT on such costs can be deducted according to the 'general' VAT recovery right of the business.

ECLI:EU:C:1998:1, paragraph 15; joined cases C-110/98 to C-147/98, Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT), ECLI:EU:C:2000:145, paragraph 44; and case C-98/98, Commissioners of Customs and Excise v Midland Bank plc, ECLI:EU:C:2000:300, paragraph 19.

955 Case C-4/94, BLP Group plc v Commissioners of Customs & Excise, ECLI:EU:C:1995:107, paragraphs 18 and 19, and C-98/98, Commissioners of Customs and Excise v Midland Bank plc, ECLI:EU:C:2000:300, paragraph 20.

956 C-98/98, Commissioners of Customs and Excise v Midland Bank plc, ECLI:EU:C:2000:300, paragraph 29.

957 See, for example, CJEU case C-249/17, Ryanair Ltd v The Revenue Commissioners, ECLI:EU:C:2018:834, paragraph 26.

958 S.T.M. Beelen, Aftrek van BTW als (belaste) omzet ontbreekt (Fiscale Monografieën, nr. 134), Deventer: Kluwer 2010, p. 122.

959 CJEU case C-153/17, Commissioners for Her Majesty's Revenue and Customs v Volkswagen Financial Services (UK) Ltd, ECLI:EU:C:2018:845, paragraph 44.

960 See, for example, CJEU case C-249/17, Ryanair Ltd v The Revenue Commissioners, ECLI:EU:C:2018:834, paragraph 27.

In some sectors, such as insurance and games of chance, goods and services can be purchased that will be used for the provision of the business' actual business activities, but that can be perceived as being provided free of (additional) charge. For example, if a person takes out car insurance that will ensure that the car is repaired at no extra charge when it is broken, that person will (periodically) pay an insurance premium. From a VAT perspective, the essentials of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded.[961] In my view, this means that the insured does not pay for the service (or goods) that he will receive, for example as restitution or part of a repair under the insurance agreement, but for the right to receive these in the event of materialisation of the risk covered. The premiums are, therefore, not (partial) prepayments for the agreed services or goods that may have to be provided to him when the insured risk materializes, but for the service of being covered/insured against the effect of the materialisation of the covered risk. The insurance company provide insurance services, it does not (as a general rule) sell goods or other services.

The same applies to organisers of games of chance, such as lotteries. A lottery is the distribution of prizes by chance where the persons taking part make a payment or consideration in return for obtaining their chance of a prize.[962] Organisers of lotteries don't sell goods or services (other than lottery services). However, they do distribute prizes, which can be goods and/or services, to the winners. The payments received for issuing the lottery tickets are, however, not consideration for the supply or distribution of those prizes.

Insurance services and gambling services such as lotteries are VAT exempt.[963] This means that no VAT is charged on the insurance premiums or the payments for the lottery tickets, and the insurance company or the lottery organiser, as a main rule, cannot deduct the VAT on the costs that are directly related to these activities.[964] This means that the VAT incurred by insurance companies and lottery organisers on the cost of the goods and services that will be distributed as a result of the materialisation of the insured risk will, as a general rule, not be deductible. A direct and immediate link exists between these goods and services and the insurance transactions or the lottery activities, because the expenditure for these goods and services will, as a general rule, be part of the cost components of those VAT exempt

961 See CJEU case C-349/96, Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise, ECLI:EU:C:1999:93, paragraph 17.

962 HMRC's VAT Notice 701/29: betting, gaming and lotteries, Updated 31 March 2017, Section 4 (accessible online via https://www.gov.uk/government/publications/vat-notice-70129-betting-gaming-and-lotteries/vat-notice-70129-betting-gaming-and-lotteries#lotteries, last visited on 2 January 2018).

963 Article 135(1)(a) for insurance transactions and 135(1)(i) for betting, lotteries and other forms of gambling.

964 Article 168 of the EU VAT Directive. However, input VAT related to certain insurance transactions may be deductible under Article 169(c) of the EU VAT Directive.

transactions or have a direct and immediate link with the whole economic activity of that taxable person.

8.3 Direct and immediate link with a free transaction?

Sometimes lotteries are organised for free. No payment is charged for the lottery tickets, for example as a promotional scheme. The question then arises whether the VAT incurred on the cost of the goods and services that will be distributed to the prize winners can be deducted by the business that organises the lottery.

Firs it has to be established whether the free lottery can qualify as an economic activity. In the Sveda-case, the CJEU has ruled that free activities that should regarded as a means of attracting (potential) customers with a view to providing them with goods and services qualifies as an economic activity.[965] Implicitly, the CJEU said the same in the Kuwait Petroleum-case,[966] because otherwise the VAT consequences of giving away goods for free at a petrol station would have had to be different. Articles 16 and 26 of the EU VAT Directive aim to tax certain transactions that are not performed for consideration, which can only be done if these transactions are economic activities. This means that activities that are performed for no consideration, but that are performed for business purposes, are considered economic activities from an EU VAT perspective.

Second, it has to be established whether the free lottery can qualify as a VAT exempt activity. After all, in this case, the supply of services carried out free of charge by a taxable person (i.e. organising the lottery) is not treated as a supply for consideration because it is not performed for purposes other than those of his business.[967] However, CJEU case law exists on the question whether free of charge supplies can also be treated as VAT exempt supplies, but only with regard to the making available of immovable property, and only where this was done for private use, i.e. in cases where EU VAT rules treated these supplies as if they were made for consideration.[968] In one of those cases, the CJEU decided that the private use, by the staff of a taxable person which is a legal person, of part of a building constructed or owned by virtue of a right in rem in immovable property, held by that taxable person, cannot be treated as the letting of immovable property for EU VAT purposes. The CJEU came to this conclusion not because VAT exemptions do not apply to transactions that are performed free of charge, but because 'letting of immovable property' is an EU concept that requires certain features, i.e. that rent is paid and that there is an agreement on the duration of the right of enjoyment, the right of occupation of the

965 See CJEU case C-126/14, UAB "Sveda" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, ECLI:EU:C:2015:712, paragraphs 22 and 23.

966 C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203.

967 See Article 26 of the EU VAT Directive.

968 See Article 26 of the EU VAT Directive.

dwelling, or the exclusion of third parties.[969] In absence of these features, the use of immovable property cannot qualify as (VAT exempt) lease. Lottery is not an EU VAT concept, because the application of the exemption is subject to the conditions and limitations laid down by each Member State.[970] This, in my view, implies that these free of charge lottery services can, under certain circumstances, be treated as VAT exempt supplies (and treated as if they were made for consideration). In those cases, the VAT incurred on the goods and services distributed to the lottery winners cannot be deducted, under the same rationale as I described earlier.

However, if the free of charge lottery is not organised for purposes other than those of the business of the lottery organiser, then the lottery activities should not be treated as a (VAT exempt) supply of services for consideration.[971] Can it, in that case, still be possible to consider the costs of the goods and services that are (to be) distributed to the lottery winners to be directly and immediately linked to the lottery activities? In my view, this is not the case.

Recent CJEU case law, such as Iberdrola,[972] C&D Foods[973] and VW Financial Services,[974] demonstrates two relevant things in this respect. First, that for costs to be allocated to certain output or taxed transactions, these costs do not have to actually be included in the price charged for those transactions. In the VW Financial Services case, the CJEU held that "… in so far as (…) general costs were in fact incurred (…) for the purpose of the supply of (…) taxed transactions, those costs are, as such, components of the price of those transactions".[975] From the Iberdrola case and the C&D Foods cases, it is clear that if costs were made for the purpose of being able to perform taxed activities, even where these costs are not in themselves directly related to any specific output, the VAT on those costs should still be deductible. In C&D Foods, a holding company incurred costs in relation to the sale of shares by its subsidiary of its sub-subsidiary. This means that these costs did not directly relate to any output or transaction as performed by the business incurring the costs itself, because the shares were sold by its subsidiary, which was a different taxable person. From this case it is clear that VAT on such costs should be deductible if the direct and exclusive reason for incurring the costs is the taxable economic activity of the business, or the direct, permanent and necessary extension of that economic

969 CJEU case C-436/10, Belgian State v BLM SA, ECLI:EU:C:2012:185, paragraphs 29 and 30.

970 Article 135(1)(i) of the EU VAT Directive, and CJEU case C-259/10, Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc., ECLI:EU:C:2011:719, paragraph 40.

971 Article 26 of the EU VAT Directive.

972 CJEU case C-132/16, Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" - Sofia v „Iberdrola Inmobiliaria Real Estate Investments" EOOD, ECLI:EU:C:2017:683.

973 CJEU case C-502/17, C&D Foods Acquisition ApS v Skatteministeriet, ECLI:EU:C:2018:888.

974 CJEU case C-153/17, Commissioners for Her Majesty's Revenue and Customs v Volkswagen Financial Services (UK) Ltd, ECLI:EU:C:2018:845.

975 CJEU case C-153/17, Commissioners for Her Majesty's Revenue and Customs v Volkswagen Financial Services (UK) Ltd, ECLI:EU:C:2018:845, paragraph 44.

activity.[976] These cases make clear that the purpose for incurring costs is decisive in determining to which activities these costs should be allocated. If there are no taxable activities to allocate the costs to, they should be considered 'general costs' if they were incurred for business purposes. In those case, the 'exclusive reason' for incurring the costs is not relevant.

The expenditure made in relation to the supply of free VAT exempt transactions will, as a general rule, never be part of the cost components of those VAT exempt transactions. Therefore, the costs can only have a direct and immediate link with the whole economic activity of the taxable person organising the free lottery, because the direct and exclusive reason for incurring the costs is the taxable economic activity of the business, or the direct, permanent and necessary extension of the economic activity.[977]

A Dutch case exists about a business whose main business activities consisted of producing and distributing washing and cleaning products. This business organised a free prize competition to stimulate sales of its products. The Dutch Supreme Court ruled that the VAT on the costs of the products that were distributed to the prize winner cannot be deducted, because they are used for 'transactions as referred to' in the relevant provision containing the VAT exempt transaction.[978] The Dutch Supreme Court states that this is in line with the EU VAT system. I disagree. As mentioned, under the case law of the CJEU, there can only be a direct and immediate link between expenditure and a transaction if the expenditure is part of the cost components of the transaction, which cannot be the case for free transactions. Also, the CJEU has (implicitly) rejected the argument that VAT cannot be deducted on a free transaction if the supplier would not have been able to deduct the VAT on the costs of the various services acquired in order to carry out that transaction if the transaction had been an ordinary VAT exempt transaction (performed for consideration).[979] In the Abbey National I-case, the CJEU considered it immaterial what the VAT treatment of the transaction would have been 'under normal circumstances'. From this, it follows that the goods and services acquired by the organiser of a free lottery do not have a direct and immediate link with the free lottery activities. This means that the VAT incurred on the costs of these goods and services can be deducted as VAT on 'general costs' or 'overhead costs', following the general VAT deduction right of the business.[980] The UK

976 CJEU case C-502/17, C&D Foods Acquisition ApS v Skatteministeriet, ECLI:EU:C:2018:888, paragraph 38.

977 CJEU case C-502/17, C&D Foods Acquisition ApS v Skatteministeriet, ECLI:EU:C:2018:888, paragraph 38.

978 Dutch Supreme Court, case No. 23 375 (not available online), published in BNB 1987/303.

979 See, in this sense, CJEU case C-408/98, Abbey National plc v Commissioners of Customs & Excise, ECLI:EU:C:2001:110, paragraph 33.

980 See, in this sense, CJEU case C-408/98, Abbey National plc v Commissioners of Customs & Excise, ECLI:EU:C:2001:110, paragraphs 35-37.

Tax Authorities apply this view, allowing deduction of the VAT incurred on the purchase of the prizes.[981]

In my view, deduction of VAT on these costs is also in line with the economic and commercial reality of such transactions, where businesses that normally perform fully taxed transactions incur costs on promotional activities. The fact that an exemption would have applied if the business would have sold lottery tickets should not affect this, as I explained in this Section.

8.4 The VAT treatment of the distribution of the 'free lottery' prizes

Because no consideration is charged or paid for the distribution of the prizes, the distribution can only be taxed if it is 'treated as a supply of goods or services for consideration' under Articles 16 and 26 of the EU VAT Directive. For goods, this provision only applies insofar as the VAT on those goods or the component parts thereof was wholly or partly deducted by the taxable person.[982] For services, VAT deduction is not a requirement, but the distribution of these services is only treated as a supply of services for consideration if the supply is made by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.[983]

If the lottery is organised as a promotional activity, the taxable person does so for the purpose of his business. This means that in that case, no VAT is due on the distribution of services.

This is different for goods, as I describe in Chapter 6. The distribution of goods as prize for a lottery where the lottery tickets were sold for consideration, the VAT on the purchase of the goods will not have been deducted and therefore no VAT is due on the distribution of these goods. If a business has purchased goods in the course of its normal (taxed) business activities and at a later stage decides to use these goods for distribution as lottery prizes, VAT will be due (insofar as VAT was deducted) because the goods are, in the end, used (first and finally) for VAT exempt activities. With regard to the distribution of goods as prizes for a free lottery, VAT is due on the distribution insofar as the VAT on those goods or the component parts thereof was wholly or partly deducted by the taxable person. This will generally be the case if such

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981 See HMRC's VAT Notice 700/7: business promotions, published on 28 May 2012, Sections 2 and 3 (available online via https://www.gov.uk/government/publications/vat-notice-7007-business-promotions/vat-notice-7007-business-promotions, last visited on 2 January 2018) and VAT Notice VAT Notice 701/29: betting, gaming and lotteries, updated on 31 March 2017, Sections 4, 13 and 14 (available online via https://www.gov.uk/government/publications/vat-notice-70129-betting-gaming-and-lotteries, last visited on 2 January 2018).

982 Article 16 of the EU VAT Directive.

983 Article 26 of the EU VAT Directive.

lotteries are organised by businesses that (mainly or only) perform activities that are not VAT exempt, which includes most retail businesses.

8.5 Conclusion

Businesses that organise lotteries (or other prize competitions) for consideration, i.e. where people have to pay a consideration to enter the competition, perform VAT exempt activities. The VAT incurred on the purchase of goods and services that will be distributed as prizes is not deductible, and neither is the VAT on the other costs related to this activity. The distribution of the prizes is not subject to VAT, if they are supplied by the organiser of the lottery.

Businesses that organise lotteries (or other prize competitions) for free can deduct the VAT incurred on the purchase of the goods and services that will be distributed as prizes as VAT on 'general costs' or 'overhead costs'. The services that are distributed are only taxed if the lottery (or other competition) is not organised for the purpose of the (main) business organising the lottery. For goods, VAT is due on the distribution insofar as the VAT on those goods or the component parts thereof was wholly or partly deducted by the taxable person. This is different if the goods qualify as samples or as gifts of small value.[984] This is in line with the economic and commercial reality of these types of transactions.

Because the VAT treatment of the supply of goods and services as (lottery) prizes under positive law does not deviate from the VAT treatment of such transactions under appropriate or desired law, no recommendations need to be made.

[984] See Article 16 of the EU VAT Directive.

9 Vouchers.

9.1 Introduction

In this chapter, I discuss the VAT treatment of promotional activities involving vouchers (voucher transactions).[985] This chapter is the culmination of all previous chapters, combining the findings and conclusions and applying these to voucher transactions. I will start with a general description of the concept of 'vouchers'. I will then detail the EU VAT treatment of voucher transactions under current law. I will make a distinction between vouchers that are covered by the EU VAT definition of 'voucher' from 1 January 2019 and other types of vouchers, whose VAT treatment is based on the application of provisions from the EU VAT Directive as well as CJEU case law. I will then determine whether this VAT treatment is in line with my research framework, and more particularly the purpose of EU VAT (taxing expenditure for local private consumption) and economic and commercial reality. Where the current VAT treatment deviates from the VAT treatment under desired or appropriate law, I will make recommendations on the VAT treatment of these transactions.

9.2 Vouchers and promotional activities

Vouchers are often used for sales promotion.[986] However, not all vouchers are used for promotional activities. The term 'voucher' is a blanket term for many different instruments: gift cards, book tokens, food stamps, phone cards, admission tickets and discount coupons, just to mention a few.[987] Under the principle of neutrality,[988] the VAT treatment of promotional activities involving vouchers should be based on the same principles that determine the VAT treatment of other (non-promotional) voucher transactions, as I will demonstrate in this chapter.

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985 Many of my views on this specific topic, as presented in this Chapter, were publised in: Jeroen Bijl, 'VAT: 'Money Off Vouchers' and 'Cash Back Schemes' – What Are the Problems and How Can They Be Solved?' (2012) 21 EC Tax Review, Issue 5, pp. 262–276 and Jeroen Bijl, 'VAT, Vouchers, Rights and Payments: The VAT Treatment of Vouchers' (2013) 22 EC Tax Review, Issue 3, pp. 115–130.

986 See G.D. Harrell, Marketing – Connecting with Customers, First Edition (Upper Saddle River (US-NJ), Prentice Hall, 2004), 479 and 484.

987 For this research, I have come across many examples/forms of vouchers, some of which I have listed here: holiday vouchers, trading stamps, gift cards, coupons, food stamps, labour vouchers, luncheon vouchers, tokens, tickets, rebate cards, loyalty cards, rewards cards, points cards, stored value cards, telephone cards, SIM recharge or top-up vouchers, revenue/fiscal stamps, postage stamps, cash back vouchers, money off vouchers, discount vouchers, codes (promotional, discount, voucher, shopping etc.) and mobile coupons.

988 See Section 2.3.1.

Vouchers.

Vouchers are described as embodying rights.[989,990,991] In the dictionary, a voucher is described as "a piece of paper that can be used to pay for particular goods or services or that allows you to pay less than the usual price for them".[992,993] The right embodied in a voucher would, under this specific definition, be the right to use the voucher as means of (partial) payment, instead of payment in cash, or as proof of (pre)payment for certain supplies of goods or services, as well as proof of entitlement to a discount on certain transactions. Vouchers that are issued or sold for consideration create a separation between a payment and a (subsequent) supply, thereby creating the possibility of breakage (payment without a subsequent supply). I will elaborate on this in Section 9.5.2.

Vouchers facilitate transactions but are not always necessary to conclude those transactions. Economic reality dictates that the use of vouchers should not determine the nature of the actual, 'underlying' transaction(s).

For some vouchers, the most relevant element is that the business that will accept the vouchers also issues them for consideration, which allows it to receive payment before any supplies of goods or services are made, with the additional benefit that some vouchers are never redeemed. Examples are gift cards, prepaid phone cards and pre-sold admission tickets.

Other vouchers are issued by a business that will indemnify the companies accepting it as payment for their supplies. Examples are luncheon vouchers and book tokens. With regard to issuing these vouchers, it is not the business that accepts the voucher (as consideration for its supply) but the business issuing or selling them that receives money where a chance exists that it will not have to indemnify other businesses (if the vouchers are not redeemed).

Some vouchers are issued for no consideration. These vouchers can often be used to obtain discounts or rebates off the retail price of certain products.

There are also voucher schemes where the issuer, as a form of business promotion, sells vouchers that allow the holder a form of discount at other businesses, where the issuer of the voucher does not indemnify the businesses accepting these vouchers (or

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989 See the Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206, not published in the Official Journal, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF, last visited on 12 March 2019.

990 For the difference between 'rights as such' and 'rights to (future) supplies' see Chapter 9. Also see P. Gallagher, R. Cordara, Supply of Rights and Rights to a Supply, 22 Int'l. VAT Monitor 1, p. 12-16 (2011), Journals IBFD.

991 See Section 9.3.

992 Cambridge Dictionaries Online, Definition of voucher (noun) from the Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press, accessed on 12 March 2019.

993 It should be clear that nowadays, vouchers are not only pieces of paper but also exists as plastic (or other) cards, electronically (as 'virtual vouchers') etc.

vice versa).[994] The rationale behind this type of voucher scheme lies in the fact that the business selling the vouchers is considered to promote the businesses that agree to accept the vouchers, because people will have to go to those businesses to redeem the vouchers and often (have to) purchase more than only the free or discounted products or services, and may well become regular customers of those businesses.

Also, some transactions that do not involve an actual voucher closely resemble voucher transactions. Topping up mobile phone credit online is an example of this. From a VAT neutrality perspective, payment for a top-up should not be treated differently from the initial (pre)payment/instalment for the telecommunications services provider for the supply of a (prepaid) phone card, since these transactions are the same from an economic and commercial reality perspective.

Some vouchers have a 'face value' and can be used as (proof of) full or partial (pre)payment at specific businesses or for specific goods or services. Other vouchers entitle the holder of the voucher to a 'relative' discount (a percentage of the advertised price). It is also possible to allow the holder of a voucher a fixed ('face value') discount on specific transactions. Some vouchers are sold (supplied for consideration), other vouchers are distributed for free. Sometimes they can only be used in combination with other transactions.

The nature of all these transactions involving different types of vouchers needs to be determined in order to establish the correct EU VAT treatment of these transactions.

A business that uses vouchers as (part of) a promotional activity, by supplying vouchers (for money or for free) and/or accepting vouchers as (partial) payment for (some of) its supplies, usually does this for various reasons, some of which I have listed below:[995]

- Some of the voucher business models are partially based on the foreseeable fact that not all vouchers will be redeemed (cash advantage) – this advantage only applies to vouchers that are supplied for consideration,
- The business issuing the voucher has money at its disposition before any supply is made (cash flow advantage) – this advantage only applies to vouchers that are supplied for consideration,
- Voucher schemes increase customer loyalty,
- Voucher schemes increase the sales of specific products,
- Voucher schemes get people to come to a shop to redeem the voucher, thereby increasing sales as a whole, because research shows that the average consumer spends considerably more than the value of the voucher,
- Vouchers remove the 'risk' associated with certain gifts items such as books, music and beauty products, increasing the sale of such products as gifts – this advantage only applies to vouchers that are supplied for consideration,

994 CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

995 Some of these advantages are described by Jon Hart and Melanie Hill, 'Fighting Over the Balance Left on Unused Gift Cards', The Wall Street Journal Online, accountan, which can be found on-line at: http://online.wsj.com/public/resources/documents/SB107219160756934900.htm

- Some issuers of vouchers require the holders to provide them with information that can be of value for marketing purposes, e.g. by linking consumer data to specific transactions or trends in purchasing behaviour, and
- Vouchers can create tax advantages (e.g. an employer providing its employees luncheon vouchers as part of their salary (in kind). Under certain circumstances, these benefits are excluded from the personal income tax base).[996]

Another possible reason for granting a discount – besides sales promotion – is to stimulate desired behaviour, for example by offering a discount for early payment. This can also be considered a 'promotional activity', but this is not the type of promotional activity that is the topic of this research.

9.3 Is the supply of a voucher the supply of a right or does it embody the right to a supply?

From an EU VAT perspective, the supply of a right (for consideration) can be a taxable transaction. After all, any transaction that does not constitute a supply of goods is a supply of services.[997,998] And in the EU VAT Directive, even the supply of goods is defined as the transfer of a right (the "right to dispose of tangible property as owner").[999] Other examples of taxable transactions regarding rights are the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right,[1000] the supply of the exclusive right to install and operate cigarette machines for a specific period of time on the premises of someone else,[1001] the supply of a right to make use of a golf club's facilities in exchange for a membership fee[1002] and the supply of the right, against payment, to catch fish in a specific part of a river.[1003] Options are also rights: rights to buy or sell a particular thing at a specified price within a set time.[1004] The supply of such options for consideration (the 'premium') is the supply of a service. Other types of rights are intellectual property rights, such as patents, copyright, industrial design rights, plant varieties (plant breeders' rights) and trademarks. It can also be argued that entrance tickets (e.g. to concerts or museums) and travel tickets (e.g. a train ticket or a boarding card for an air journey) embody rights: the right to enter the designated premises (at,

996 From the facts of a referral to the CJEU by a Luxembourg court, case C-395/12, État du Grand-duché de Luxembourg, Administration de l'enregistrement et des domains v. Edenred Luxembourg SA.

997 See Article 24(1) of the EU VAT Directive.

998 As mentioned above, this reasoning is the basis for the CJEU's decision to consider a supply of vouchers a taxable transaction in Case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450.

999 See Article 14(1) of the EU VAT Directive.

1000 CJEU C-284/03, Belgian State v Temco Europe SA, ECLI:EU:C:2004:730, paragraph 19. Also see the case law cited there.

1001 See CJEU Case C-275/01, Sinclair Collis Ltd v Commissioners of Customs and Excise, ECLI:EU:C:2003:341.

1002 See CJEU Case C-174/00, Kennemer Golf & Country Club and Staatssecretaris van Financiën, ECLI:EU:C:2002:200.

1003 See CJEU Case C-451/06, Gabriele Walderdorff v Finanzamt Waldviertel, ECLI:EU:C:2007:761.

1004 Oxford Dictionary on-line, https://en.oxforddictionaries.com/definition/option (second meaning), last visited on 12 March 2019.

during or before a certain time) or the right to be transported (at during or before a certain time).

The concept of a 'right' is very broad, as demonstrated by the above examples. Therefore, it is in my view impossible to determine the VAT consequences of 'the supply of a right'. In this Section, I will elaborate on the VAT treatment of transactions regarding rights.

9.3.1 The supply of a right as such and the supply of a right to a future supply

First, a distinction can be made between agreements where the right 'as such' is the object or purpose of a transaction, as opposed to transactions concerning the supply of a right to a future transaction, where the future supply of goods or services is the actual object of the transaction. In the latter case, the payment for such rights may – if all relevant requirements, which I will elaborate on, are met – be qualified as a 'prepayment'.

From an EU VAT perspective, it is relevant to establish whether a transaction constitutes a payment for a future supply or the supply of a right.[1005] If a payment is agreed and made before an agreed supply is made, this payment may qualify as a prepayment. A prepayment triggers a mechanism in VAT that causes the VAT on the future transaction to become due (payable to the tax authorities) before the actual supply takes place. I will elaborate further on this below. If a prepayment is made for a supply that is, in the end, not (fully) fulfilled, it can be argued that the VAT that has become due as a result of paying/receiving the prepayment should be adjusted (repaid to the taxable person), because only certain specific transactions are subject to VAT,[1006] and the payment for a transaction as such is not. In the terms of the EU VAT Directive, if a payment qualifies as a 'prepayment' for VAT, the VAT shall become chargeable on receipt of the payment and on the amount received, even though the 'chargeable event' has not (yet) occurred.[1007] If a payment is made for a future transaction that is insufficiently well defined, the payment in itself does not trigger any VAT consequences. If, on the other hand, a 'right as such' is transferred (for consideration), the VAT on that supply becomes chargeable when (and because) that service is supplied.[1008] The VAT treatment of 'breakage', or the amount paid before a supply is made and that is kept by the recipient even though no supply is made, is also a relevant when looking at the difference between the supply of a right as such and the supply of the right to a future supply. I will further elaborate on breakage in Section 9.5.2.

1005 The difference is also relevant for Australian GST, see P. Gallagher, R. Cordara, Supply of Rights and Rights to a Supply, 22 Int'l. VAT Monitor 1, p. 12-16 (2011), Journals IBFD.
1006 Article 2 of the EU VAT Directive.
1007 See Articles 63 and 65 of the EU VAT Directive.
1008 See Article 63 of the EU VAT Directive.

9.3.2 The difference between a right as such and the right to a future supply

With regard to the supply of a right 'as such', even if the 'underlying goods or services' are not used, the right to do so is actually transferred to the purchaser. Examples of these 'rights as such' are intellectual property rights (e.g. a patent), certain subscriptions and memberships, fishing rights/permits and the lease of moveable and immoveable property. Because the transfer of the right 'as such' is the object, or aim, of a transaction, the supply of that right is a VAT taxable transaction.[1009] The person that obtains these rights, pays for these 'rights as such', and not for (based on the above examples) the actual number of patented products made and sold,[1010] the time he actually makes use of the facilities of the golf course at the golf club that he is a member of, the (amount of) fish that he actually catches or the time that he actually uses the (relevant part of) the building. These types of rights can also be worded as follows: having the right to use goods and/or services and/or intellectual property rights (or the right to disallow the use of goods and/or services and/or intellectual property by others) during an agreed period of time.

This is different from the right to a future supply. In that case, the 'right' is not the object of the transaction. The transaction embodies the promise that the recipient will receive an agreed supply in the future. Payment and supply are separated in time. Therefore, it is also possible to supply the right to the future supply of a right, e.g. the lease of an apartment that commences in six months' time. A cinema ticket embodies the right to be admitted to the cinema, often on a specific date and during a specific time to see a specific film. A book token embodies the right for the holder to use it as (part) payment for certain specific goods or services to be supplied by (a) specific supplier(s). The actual (future) supplies are the admission to the cinema and the supply of the book. Payment and supply are separated. If a person buys a cinema ticket at the cinema for a film that will play shortly, and he subsequently enters the building to see that film, this temporal separation does not exist, and it becomes even more clear that the payment is actually made for the admission to the film. Buying that same ticket online two days in advance does not change that.

The difference between the supply of a 'right as such' and other rights to obtain or use goods or services in the future can be further explained as follows. A gym membership or the lease of a car costs a certain amount, which can be paid in advance. The (residual) value of this membership or the use of the car does not depend on the actual use, but on the time elapsed between the beginning and the end of the period in which the right can be exercised.[1011] By this I mean that if it would be possible to transfer the membership or the lease half way the contractually agreed period, the price for the remaining time is not dependent on the actual use so far[1012] or the foreseen future use

1009 If made for consideration by a taxable person acting as such.

1010 It is also possible to pay for an intellectual property right by calculating the 'actual use' of the right.

1011 Assuming that the value of the car, e.g. through depreciation, is irrelevant for calculating the lease instalments.

1012 By this I mean the number of times of or de duration when the right was actually used during the period for which the right is granted – e.g. how often the car is actually driven during the lease period or how often the person holding

of the transferred right (in and by itself). This is different for, for example, a right to come to the gym and use the facilities for a fixed number of times (e.g. during a month) or the right to catch a specific amount of fish (per year). The (residual) value of these rights depends on the actual use or consumption of those rights until the moment of the agreed transfer of that right.[1013] With regard to the latter type(s), if these rights are transferred, the object of that supply is not the right 'as such', but the (remaining) actual (or possible) use or the actually agreed predetermined 'units'[1014] that are to be supplied.

As an example, in infringement procedures against the UK and Ireland[1015] the CJEU has held that the use of roads on payment of a consideration (toll) should not be qualified as 'the letting of immovable property' (i.e. the supply of a right 'as such') but rather as 'offering the possibility of making a particular journey rapidly and more safely' (i.e. the actual use of the toll road), because the duration of the use of the road is not a factor taken into account by the parties, in particular in determining the price. This makes clear that 'time' or 'duration of use' is a relevant factor for the supply of 'rights as such' but not for the supply of 'rights to a future supply'.

Further examples of the supply of rights to future supplies are: granting someone the right to choose items (goods) from a long list of goods to be supplied to him in the future,[1016] supplying someone points that he can accumulate in order to exchange/redeem those points for a (future) stay in an accommodation of his choice from the list of available accommodations.[1017] These supplies are not subject to VAT, because they are not (yet) complete (because the taxable supply or 'chargeable event' has not yet taken place). If the underlying supply itself is not (or insufficiently well) defined, the payments for these rights do not trigger a VAT liability either.[1018]

I have summarised the above in the following two diagrams, which I explain below:

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the membership actually went to the gym. The taxable transaction consists of the goods or services being at the disposal of the customer during the agreed period of time.

1013 Use can, of course, also be measured in time. For example, an agreement that allows a customer to use the Internet for 5 hours each month for a fixed price is not a supply of a right 'as such', even though the (residual) value is determined by time, because in this case 'time' is a measure for use/consumption.

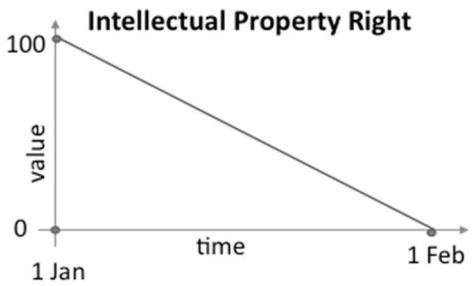
1014 Units meaning measures for use or consumption.

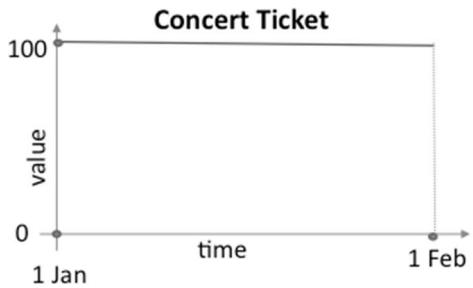
1015 See CJEU Cases C-359/97, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, ECLI:EU:C:2000:426, par. 68-69 and C-358/97, Commission of the European Communities v Ireland, ECLI:EU:C:2000:425, par. 57.

1016 See CJEU Case C-419/02, BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2006:12..

1017 See CJEU Case C-270/09, MacDonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780.

1018 For completeness' sake, I also mention certain types of derivatives and similar instruments here as covered by the term 'right to a supply' here. Because this research mainly deals with the VAT treatment of vouchers in the context of promotional activities, I will not elaborate on the VAT treatment of these instruments in great detail.





The value of a 'right as such' depends on the time elapsed between the origination of the right and the end of it. For example, the transfer of an intellectual property right, a gym membership or the lease of a property all start at an agreed point in time and end at a later point in time. Whether linear or not, the elapsed time between origination and end determines the value of that right at that time. It is not determined by the actual use of the intellectual property, the gym or the property. Obviously, external circumstances may affect pricing as well, as may actual use if, for example, the property becomes less valuable through wear.

On the other hand, the value of the right to an underlying (future) supply is not affected by time but only by the actual use of the underlying supply. A concert ticket purchased a month before a concert is not worth half the original price two weeks before the concert, just because time elapsed. If anything, other external market influences may have increased the price of the ticket. And as soon as the ticket is used to gain entry to the concert, the ticket becomes 'worthless', except for sentimental value or, for example, for old concert ticket collectors. The same rationale applies to the value of a bundle of units, e.g. a 10-journey bus ticket[1019] or a data bundle for mobile phone use,[1020] where the 'bundle' decreases in value not because of time (unless of course there's a time limit to the use of the units) but because of actual use of the units included in the bundle.

1019 See, for example, FirstGroup's 'The Flexible 10 Journey ticket' on https://www.firstgroup.com/essex/tickets/ticket-types/flexible-10-journey-ticket, last visited on 13 March 2019.

1020 See, for example, 'Pay as you go with Vodafone', on https://www.vodafone.co.uk/mobile/pay-as-you-go-plans, last visited on 13 March 2019.

The above also applies to options, i.e. contracts which give the holder of the option the right, but not the obligation, to buy or sell an underlying asset or instrument at a specific price on a specified date, depending on the form of the option. In my view, these options qualify as 'rights as such' because, even though time is a relevant factor in these types of agreements, unlike other 'rights as such', there is no main rule that says that these options decrease in value as a result of time elapsing. However, the trade in options is a trade in those rights as such, for a consideration that is separate from intrinsic value of the underlying asset or instrument, also because the premium is paid even if the option is not exercised (i.e. when the option expires). This is in line with the other difference between 'rights as such' and rights to future supplies: the supply for a 'right as such' is a taxable transaction that is subject to VAT because the taxable event is the transfer of that right in itself. This is different for the supply of the right to a future supply: in that case, even though a right is transferred for consideration, it can be argued that no taxable event has taken place at the moment of the transfer of that right. Also, based on the principle that only consumption should be subject to VAT,[1021] the supply of a right as such actually embodies for the purchaser a benefit which would enable him to be considered consumer of a service,[1022] whereas the supply of a right to a future supply does not (yet). As mentioned before, if certain criteria are met, the payment of the consideration for a right to a future supply is considered a 'prepayment', which triggers VAT to become payable before the relevant taxable transaction has taken place.

For vouchers, the above means in my view that payment for a voucher is either a prepayment for a future supply,[1023] triggering VAT to become payable at the moment the consideration for issuing the voucher is received, or a deposit that can be used as consideration for a future supply,[1024] postponing the VAT liability to the moment of redemption of that voucher, as I will explain in this Chapter. This is only different for a specific type of voucher, the so-called 'Single Purpose Voucher'[1025] or 'SPV' because under Article 30b of the EU VAT Directive, each transfer of a single-purpose voucher made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the voucher relates.

1021 CJEU case C-317/94, Elida Gibbs Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1996:400, paragraph 19: "The basic principle of the VAT system is that it is intended to tax only the final consumer". For the discussion about whether this is really a 'principle of the VAT system', I refer to A.H. Bomer, De doorwerking van algemene rechtsbeginselen in de BTW, Kluwer, 2012.

1022 CJEU Case C-215/94, Jürgen Mohr and Finanzamt Bad Segeberg, ECLI:EU:C:1996:72, paragraph 22.

1023 See, in this sense, CJEU case C-250/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841.

1024 See, in this sense, CJEU case C-277/05, Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie, ECLI:EU:C:2007:440.

1025 The definition of Single Purpose Voucher can be found Article 30a of the EU VAT Directive: "'single-purpose voucher' means a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher". Voucher is defined in the same provision as "(…) an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument".

9.3.3 Vouchers (except SPVs) embody the right to a future supply, not a right as such.

As mentioned in the previous Section (Section 9.3.2), under the current EU VAT rules, issuing or transferring an SPV is regarded as the supply of the goods or services to which that SPV relates.[1026] I will now elaborate on why in my view, issuing or transferring any other voucher should be considered the supply of an instrument evidencing the right to a (future) supply of goods or services and not the supply of a right as such (from an EU VAT perspective).

When a person goes to a shop to buy a voucher, for example a book token as a present for a friend, the aim of that transaction is actually the purchase of that voucher. From a legal perspective, a 'complete' transaction takes place: the supplier of the voucher receives the agreed consideration in return for the supply of a voucher that represents a certain value or right. For the average consumer, issuing a voucher can be the aim of a transaction. Why would this be different 'in the world of VAT?'.[1027]

Vouchers may be used as a result of the fact that a transaction is split into separate elements (payment and actual supply), for various different reasons. In those cases, the voucher is only a means to provide evidence that part of the obligations under the agreement has been fulfilled. This is usually (part of) the payment. In other cases, the voucher may embody a certain right, e.g. a right to a discount. Again, in that example the voucher itself is not the object of the transaction – it only serves as (the embodiment of) 'proof' of the fact that the holder is entitled to a discount on the price of a supply. Of course, as mentioned before, using vouchers can be a means of achieving certain goals,[1028] but this does not change the fact that from a VAT perspective, in my view, the issuing and the supply of vouchers is not the actual object of a transaction.

It is possible that vouchers are purchased because the purchaser actually wants to obtain the voucher itself and not because he wishes to purchase the underlying transaction. This can, for example, be the case with gift cards: some people are afraid that they may buy someone a present that the recipient will not be happy with, and to avoid that, they give him/her a gift card instead. Rather than giving cash, by giving a gift card they can at least give an indication of the type of present that they were considering, e.g. by giving a book token or a theatre voucher, or of what (type of) shop they thought the recipient of the voucher would like to get his/her present from. Even though the intention of the purchaser is obviously to purchase a specific voucher of a specific value, from a VAT perspective, the purpose of the transaction is not to provide the recipient with a voucher, but to ultimately enable the recipient to choose which underlying supply (of a good and/or service) he will obtain: a present of his own

1026 Article 30a of the EU VAT Directive.

1027 "Beyond the everyday world, (...), lies the world of VAT, a kind of fiscal theme park in which factual and legal realities are suspended or inverted", Lord Justice Sedley, England and Wales Court of Appeal in the case Royal & Sun Alliance Insurance Group Plc v Customs & Excise [2001] EWCA Civ 1476 (9 October 2001).

1028 Some examples are cash flow (having the money before a supply has to be made), cash (breakage) and increasing sales.

choice. Therefore, in my view, for VAT purposes the voucher in this example is not the object of the 'total transaction' but just a means of directing or limiting the spending potential of a certain deposited or designated amount of money.

People may need a voucher to actually obtain the goods or services that the voucher embodies a right to, but this does not mean that the voucher is the object of the transaction. Rather, as I said above, this proves that the vouchers should be considered to represent/embody proof of the fact that the holder is entitled to certain goods or services or a discount. Vouchers grant the holder the right to be party to the underlying transaction or a preferential treatment, e.g. a discount on the price of an underlying transaction. And because in a lot of cases, the holder can be anyone, the voucher is the required proof that the holder is actually entitled to receive the part of the agreed transaction that the voucher allows the holder to obtain.

Not only the issuing of a voucher, but also the (subsequent) supply of a voucher for consideration by someone else than the issuer is, in my view, not a transaction where the voucher is the actual 'purpose' or 'object' of the transaction. In these cases, making a supply of goods or services upon redemption of the voucher may not be the ultimate purpose of the transaction, but for these businesses, the voucher still only represents proof that the holder is actually entitled to receive the part of the agreed transaction that the voucher allows the holder to obtain. The object or the purpose of these resellers is to make a profit, for example by providing a marketing or distribution service for consideration to the issuer of the voucher or by adding a margin to the purchase price of the voucher when selling it. The voucher itself is not relevant as such. This is different for businesses that resell SPVs in their own name, because even if the vouchers are not the purpose or aim of the transaction outside the world of VAT, the EU VAT Directive dictates that businesses transferring an SPV in their own name shall be regarded as supplying the goods or services to which the voucher relates.[1029]

Further support for my view that a voucher is not the aim or purpose of a transaction can be found in the European Commission's original proposal for the VAT treatment of vouchers.[1030] In this original proposal, the Commission proposed to include the following provisions in the EU VAT Directive: "The supply of a voucher carrying a right to receive a supply of goods or services and the subsequent supply of these goods or services shall be regarded as a single transaction. This single transaction shall be treated in the same way as a supply of goods or services had the goods or services not been supplied through the use of a voucher"[1031] and "Where a single transaction as referred to in Article 30b consists in the supply of a multi-purpose voucher and a subsequent supply of goods or services, the redeemer shall be regarded as having carried out the taxable supply".[1032]

1029 Article 30b of the EU VAT Directive.

1030 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206 (the Voucher Proposal), not published in the Official Journal, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF (last visited on 14 March 2019).

1031 Proposed Art. 30b from the original Voucher Proposal.

1032 Proposed addition to Art. 193 from the original Voucher Proposal.

The Commission explained its reason for proposing these provisions as follows: "Under the terms of this article, where a voucher bears a right to a supply of goods or services, the supply of this right and the subsequent supply of goods or services are linked and shall be regarded as a single transaction. Since the tax treatment of this single transaction shall be the same as that which would have been applied had the goods or services not been supplied through the use of a voucher, the place of supply and the applicable rate should be determined by the goods or services supplied" and "The paragraph to be included in this article, clarifies that it is always the redeemer (…) who carries out the taxable supply of goods or services and is therefore the person liable for payment of VAT. This is significant where the issuer and the redeemer of the voucher are not the same person. Only the redeemer knows what has been supplied and where and when that supply took place".[1033] It should be clear that the Commission shared my view that issuing a voucher is not a taxable supply in its original proposal. As mentioned above in the first paragraph of this Section, the Commission changed this view where it comes to the VAT treatment of the transfer of SPVs.

Based on the above, in my view, vouchers (except SPVs) embody the right to a future supply, not a right as such.

9.4 Specific types of voucher transactions – what will be discussed in this Chapter

In this Chapter, I examine the EU VAT treatment of voucher transactions. Since 1 January 2019, the EU VAT Directive contains a definition of voucher in Article 30a: "'voucher' means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument". However, instruments exist that are not covered by this definition but that are still considered 'vouchers', such as price-reduction coupons,[1034] money-off coupons and cash-back coupons[1035] and other discount cards.[1036] The VAT treatment of these 'vouchers' is not covered by the rules regarding the VAT treatment of vouchers that entered into force on 1 January 2019, but by the 'general' EU VAT rules and CJEU case law.

In this Chapter, I will first focus on the current and appropriate VAT treatment of transactions involving vouchers as defined in Article 30a of the EU VAT Directive. I will then look into the current and appropriate VAT treatment of other vouchers. I will separately research the possibility of applying a VAT exemption to (certain) voucher transactions.

1033 See the original Voucher Proposal, Section 5 (Detailed Explanation of the Proposal), Art. 30b and Art. 193.

1034 For an example of the use of these coupons, see CJEU case C-398/99, Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2003:20.

1035 For an example of the use of these coupons, see CJEU case C-317/94, Elida Gibbs Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1996:400.

1036 For an example of an 'other' discount card, see CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

9.5 The VAT treatment of vouches in the EU VAT Directive

9.5.1 The definition of voucher in the EU VAT Directive

From 1 January 2019, Article 30a of the EU VAT Directive provides for the following definition of voucher:

'voucher' means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument.

In this definition, the requirement that a supplier of goods or services has to accept that instrument 'as consideration or part consideration' for a supply of goods or services raises the question whether instruments that are issued for no consideration qualify as 'vouchers' under that definition.

The answer to this question is relevant because if a voucher qualifies as 'consideration or part consideration' in the 'EU VAT sense' of the concept, the (or rather: a) value of the voucher will have to be included in the taxable amount for the underlying transaction (see below), whereas if the voucher only embodies a 'discount', the value of the voucher will be excluded from (and therefore lower) the taxable amount for the underlying transaction. This is a crucial difference, as I will now explain.

It could be argued that the EU VAT definition of 'voucher' is clarified on this point by the text of the fourth preamble to the EU Directive that amends the EU VAT Directive as regards the VAT treatment of vouchers: "Only vouchers which can be used for redemption against goods or services should be targeted by these rules. However, instruments entitling the holder to a discount upon purchase of goods or services but carrying no right to receive such goods or services should not be targeted by these rules".[1037] This preamble seems to suggest that the EU VAT definition of voucher also refers to vouchers that are issued free of charge and that can be redeemed for goods or services (without any additional payment).

Where the supplier of goods or services that accepts the voucher in the above example has also issued that voucher for consideration (i.e. against payment), I think it is obvious that the amount received for issuing the voucher should be considered to be (part of the) consideration for the actual underlying supply for which the voucher is redeemed. This is also clear from the relevant EU VAT rules regarding the treatment of voucher transactions.[1038] The same applies to situations where the business that 'actually' supplies the goods or services in return for the voucher is reimbursed for

1037 Fourth preamble to Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ L 177/9 of 1 July 2016.

1038 From 1 January 2019, for so-called 'single-purpose vouchers', this is clear from the provision laid down in Article 73 of the EU VAT Directive. For so-called 'multi-purpose vouchers', this is laid down in Article 73a of the EU VAT Directive.

accepting that voucher by the issuer of the voucher. In all these situations, the consideration received for the voucher is included in, or considered to be the consideration for, the actual supply of the goods or services for which it is redeemed.

This is different for situations where the business making the actual supplies accepts a voucher that it issued for no consideration or where the business that accepts a voucher is not reimbursed for doing so by the issuer of the voucher. In those cases, the voucher cannot be qualified as 'consideration', in the sense of the EU VAT concept, for the supply of the goods or the services. Accepting the voucher only causes the actual consideration received by the supplier of the goods or services to decrease by the amount of the (face) value of that voucher, including where the actual consideration received is reduced to nil, i.e. the face value of the 'discount voucher' is equal to or exceeds the advertised price or market value of the supply. In these cases, the voucher, in my view, does not represent 'consideration'. Consideration is what businesses receive in return for a supply of goods or services. Article 73 of the EU VAT Directive stipulates that the taxable amount includes everything that constitutes 'consideration obtained or to be obtained by the supplier, in return for the supply'. Businesses that accept 'free' vouchers do not obtain any consideration in return for their supplies to the amount represented by the 'free' vouchers.

From a non-VAT perspective, it can be argued that the supplier has an obligation to accept the discount voucher 'as consideration' for his supply, because, from the perspective of the customer redeeming the voucher he can either pay the full price in cash or part of the price in cash and 'pay for the rest' with his voucher. However, from the perspective of the supplier accepting the voucher, who is the party to the transaction that determines the taxable amount,[1039] the discount voucher is not a consideration – if anything, it lowers the consideration received, but it is not 'included in it' nor does it represent a consideration. It represents the right of the holder to a discount. This means that, in my view, 'free' vouchers that have to be accepted by a supplier of goods or services in lieu of (part of) the advertised price of those goods or services do not qualify as 'vouchers' under the EU VAT definition in Article 31a of the EU VAT Directive.

Based on the above, I disagree with the Dutch State Secretary of Finance where he explains that free vouchers that are provided with the supply of a product, where the voucher entitles the holder to obtain a specific good or service without additional payment, qualify as vouchers under the EU VAT definition.[1040]

Looking closer into the definition of voucher and what constitutes a voucher, one of the recitals to an earlier draft of the amending directive specifically mentioned that: "The provisions (i.e. the new voucher rules, JB) should not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums,

1039 Article 73 of the EU VAT Directive: "…obtained or to be obtained by the supplier, in return for the supply…".

1040 These remarks can be found in a document only available in Dutch, called "Toegevoegde bijlage bij de nota naar aanleiding van het verslag wetsvoorstel btw-behandeling van vouchers", to be accessed through https://zoek.officielebekendmakingen.nl/blg-831777.pdf, last visited on 14 March 2019.

postage stamps and similar non-vouchers".[1041] The last part ("non-vouchers") was deleted in the final version. Unfortunately, this adjustment was only explained as follows: "Recital 5 has been modified to better reflect the positions of Member States regarding the scope of the amending directive and the definition of vouchers (which is set out in Article 30a)".[1042] In my view, these transport tickets, admission tickets and postage stamps are excluded from the new voucher definition because they do indeed not qualify as "an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services". In the period between the first voucher proposal and this version, the ECJ decided that payment for these 'tickets' should be considered prepayment for services, and that these services are considered to be 'fulfilled' by enabling the recipients/customers to benefit from them.[1043] Hence, a museum ticket is not an instrument that a museum has to accept as consideration for admitting the holder of the ticket, but rather a proof of prepayment for granting access to the museum, a service that seems to be performed when the museum opens its doors to people holding tickets (regardless of whether they show up or not).

Given the fact that discount vouchers and certain documents evidencing (pre)payment for services[1044] are no longer included in the new rules for the VAT treatment of vouchers, that a voucher is "accepted as (part) consideration" and that for certain vouchers, Article 73a of the EU VAT Directive dictates that "the monetary value as indicated" on the vouchers is used for determining the taxable amount for the "the supply of goods or services provided", it seems safe to assume that the new rules only apply to vouchers that are issued and transferred for consideration (i.e. not for free), and that have a specific face value or nominal value.

Even though in my view, the definition of 'voucher' in Article 30a of the EU VAT Directive does not apply to free vouchers, I will discuss the VAT treatment of free vouchers under that definition because at least one EU Member State (the Netherlands) is of the view that free vouchers are also covered by that provision.

9.5.2 The VAT treatment of voucher transactions involving voucher as defined in the EU VAT Directive

Under the rules that came into force on 1 January 2019, a distinction should be made between two types of instruments that are both covered by the definition of 'voucher'. In Article 30a(2) of the EU VAT Directive, a so-called 'single purpose voucher' (or SPV) is defined as "a voucher where the place of supply of the goods or services to which

1041 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers – Presidency compromise text, Brussels, 29 Apr. 2016, Fisc 59 ECOFIN 326, No. 8333/16, recital 5, available at http://data.consilium.europa.eu/doc/document/ST-8333-2016-INIT/en/pdf (last visited on 15 March 2019).

1042 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers - Political agreement, Brussels, 29 Apr. 2016, Fisc 60 ECOFIN 327, No. 8334/16, available at http://data.consilium.europa.eu/doc/document/ST-8334-2016-INIT/en/pdf. (last visited on 15 March 2019).

1043 C-250/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841.

1044 Transport tickets, admission tickets to cinemas, and museums, postage stamps and similar non-vouchers. On this specific topic, see also J. Bijl, European Union: Air France-KLM: The SAFE Equivalent for Services?, 27 Intl. VAT Monitor 2, p. 95 (2016), Journals IBFD.

the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher". Under Article 30a(3) of the EU VAT Directive, all other vouchers are considered 'multi purpose vouchers' (or MPVs). The EU VAT treatment of transactions involving SPV differs from transactions involving MPVs, as I will now explain.

9.5.2.1 The VAT treatment of voucher transactions involving SPVs

9.5.2.2 What is an SPV?

In order for a voucher to qualify as an SPV, the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, have to be known at the time of issue of the voucher.[1045] This means that if a voucher can, for example, be redeemed in more than one jurisdiction, it does not qualify as an SPV but as an MPV. Also, the VAT due on the goods or services needs to be known at the time of issue of the voucher. This means that if a face value voucher can be redeemed at a business or a chain of businesses that only provide goods or services that are subject to one single VAT rate, issuing a free voucher will in many cases not be qualified as issuing an SPV because at the time of issue of that voucher, the VAT due on the underlying supply cannot be ascertained because that depends not only on the applicable VAT rate but also on the taxable amount. If goods are given away free of charge, the taxable amount is 'the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place'.[1046] If services are given away for free, the taxable amount is 'the full cost to the taxable person of providing the services' in case of services.[1047] I refer to Section 6.5 for an elaboration on how to determine the taxable amount for free supplies. Where a face value voucher can be redeemed for different goods or services, even where these services have the same advertised value, the taxable amount for the underlying transaction cannot be determined at the time of issue of the voucher, and therefore the voucher cannot be an SPV.

9.5.2.3 The VAT treatment of issuing and transferring SPVs for consideration

Under Article 30b(1) of the EU VAT Directive, each transfer of a single-purpose voucher made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the voucher relates. The actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

The above means that where an SPV is issued, the business issuing that SPV in its own name is regarded as supplying the goods or services to which that SPV relates. VAT will become chargeable under the normal rules as laid down in Articles 61-67 of the EU VAT Directive. Because of the fact that the 'underlying' goods or services are deemed to be supplied at the time of issuing or transferring SPVs, there will not be

1045 See Article 30a of the EU VAT Directive.
1046 See Article 74 of the EU VAT Directive.
1047 See Article 75 of the EU VAT Directive.

any discussion about recovering the VAT that became payable on transferring SPVs where these SPVs are never redeemed. The actual taxable transaction is deemed to have taken place.

Under the original proposal for the VAT treatment of vouchers,[1048] payment for a single-purpose voucher was considered to be a prepayment for the subsequent or envisaged supply of goods or services. This implies that VAT would become chargeable on receipt of the payment and on the amount received.[1049]

Between the publication of the original proposal and the publication of the final version of the amendment of the EU VAT Directive as regards the VAT treatment of vouchers,[1050] the CJEU ruled the Air France-KLM-case, which dealt with the VAT consequences of 'no-shows', i.e. people that had purchased airline tickets but that did not actually make the agreed journey they paid for.[1051] The relevance of the case lied in fact that if the CJEU had decided that the payment for an air transportation ticket qualified as a prepayment, triggering the VAT to become chargeable at the time of receipt of the payment, but that the actual 'no-show' meant that in the end, no taxable transaction[1052] had taken place, the VAT should be repaid to the airline companies. VAT cannot be payable if there is no supply that is subject to VAT.

In the Air France-KLM case, the CJEU ruled that "the airline company fulfils the service by enabling the passenger to benefit from those services"[1053] and that "the airline company which sells a transport ticket fulfils its contractual obligations where it puts the passenger in a position to claim his rights to the services provided for by the transport contract".[1054]

Even though I understand the judgment, I find it debatable.[1055] I understand that for certain types of services, the reasoning of the CJEU should be applicable. The type of services I mean are services that are performed for more than one (paying) customer, i.e. for different customers, at the same time. Examples are not only air

1048 Proposal for a Council Directive, amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, COM(2012)206 (the Voucher Proposal), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0206:FIN:EN:PDF.

1049 See Article 65 of the EU VAT Directive.

1050 Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ L 177/9 of 1 July 2016.

1051 CJEU joined cases C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841.

1052 No supply of goods or services for consideration in the sense of Article 2 of the EU VAT Directive.

1053 CJEU joined cases C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841, paragraph 28.

1054 CJEU joined cases C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841, paragraph 42.

1055 An example of this debate can be found in A. Schenk, What Is a Supply for VAT Purposes? Reflections on Qantas Airways Ltd, 26 Intl. VAT Monitor 2, p. 83 (2015), Journals IBFD, reacted to in J. Bijl, Supplies for EU VAT Purposes: Reflections on Air France – KLM and Vouchers, 26 Intl. VAT Monitor 3, p. 136 (2015), Journals IBFD, responded to in R. Krever, What' s in a Name? Prepayments, Deposits, Vouchers and Options, 12 Int. VAT Monitor 4, p. 241 (2015), Journals IBFD, responded to in J. Bijl, Air France-KLM: The SAFE Equivalent for Services?, 27 Intl. VAT Monitor 2, p. 95-97 (2016), Journals IBFD.

transportation such as was the case in the Air France-KLM case, but also other types of 'mass transportation' such as transportation by train or bus, as well as granting entry to concerts, museums, theme parks, fairs etc. These services are provided, irrespective of whether one (or more) of the people that paid for the service actually used the service. The service was supplied, the supplier (in the terms of the CJEU) fulfilled the service by enabling its customer to benefit from those services. I am not sure whether the same should apply to services performed (or rather, to be performed) to a single customer, e.g. the prepayment for a massage, a taxi ride, a restaurant dinner or a private music lesson. In my view it can be argued that where the designated recipient of these services does not 'show up' to receive the services, no service was actually supplied. This side step, however interesting, goes beyond the scope of this research and therefore I will not investigate it any further.

One of the side-effects of the Air France-KLM case is that the CJEU had, in its ruling, provided grounds for arguing that it can be upheld that breakage[1056] does not necessarily have to result in a VAT refund. I think that the EU legislator jumped at this option as provided by the CJEU to solve the issue of VAT repayments on breakage for SPVs, as I will now explain.

In the original voucher proposal, where a business received payment for issuing an SPV, receiving this payment was treated as receiving a prepayment for the underlying supply. This meant that VAT would become due upon receiving the prepayment (and to the amount of the prepayment received), but this also implied that if, in the end, the supply was not made, no transaction that is subject to VAT had been made, and therefore the VAT remitted at the time of receiving the prepayment should be repaid to the business.

Under the rules that apply from 1 January 2019, issuing an SPV (as well as the subsequent supply of an SPV) is treated as the supply of the underlying goods or services, at the time of the transfer of the SPV. This change in VAT treatment was not explained in any of the documents released by the EU bodies involved in this legislation, but I would not be surprised if the legislator used the CJEU's reasoning from the Air France-KLM case to solve possible practical issues regarding breakage this way. Under the new rules, breakage does not lead to any VAT refund because even if the SPVs are never used/redeemed, the underlying supply is deemed to have taken place. The new rules dictate that the supply of goods or services for consideration has taken place.

As I mentioned above, I can see how the CJEU's reasoning applies to situations where prepayments are made for 'mass services' that will take place irrespective whether all paying customers actually make use of their right to the supply. I also mentioned that

1056 Breakage is the money received by businesses that issue vouchers where these vouchers are not redeemed, i.e. the money for which these businesses effectively do not have to provide any goods or services. Breakage occurs, for example, when a voucher expires, or simply where the holder of a voucher loses it.

in my view, it can be argued that this reasoning should not apply to the supply of (more) individual(ised) services. I am convinced that the CJEU's reasoning in the Air France-KLM case cannot apply to the supply of goods.

The supply of goods is defined in the EU VAT Directive as 'the transfer of the right to dispose of tangible property as owner'. Under this definition, receiving a payment for a future transfer of that right can only qualify as receiving a prepayment in the sense of the EU VAT Directive. VAT will become chargeable upon receipt of the prepayment, and if the future supply of the goods is never made, this VAT will have to be repaid to the taxpayer. But there has to be an actual transfer of the right to dispose of the good for there to be a supply of a good.

Under Article 30b(1) of the EU VAT Directive, if the issuing or supply of an SPV entitles the holder to obtain a goods (or goods), the issuing or the supply of the SPV is regarded as a supply of the good(s) to which the voucher relates. In my view, even though I understand this solves some practical issues regarding breakage, this is not in line with the EU Concept of 'supply of goods'. The actual, physical, transfer of the right to dispose of the good(s) may never take place.

When I look at this provision in the light of the purpose of VAT, which is to tax expenditure on local private consumption, I can see how this is served by the taxation of the issue or transfer of SPVs, although, as I explained, no actual consumption takes place at the time of issue or transfer of the SPV. However, the legislator decided to implement this rule to avoid possible discussions about the VAT treatment of breakage. The economic and commercial reality of issuing and transferring SPVs for consideration is that these transactions resemble prepayments rather than actual supplies. Therefore, the payment for the issue and transfer of SPVs should, in order to better reflect the purpose of EU VAT as well as economic and commercial reality, be treated as a prepayment for the underlying supply of goods or services for VAT purposes.

An incidental difficulty created by the fact that issuing an SPV is treated as the provision of the underlying transaction, is that if an SPV is issued for consideration to a business, an issue may have to be issued by the supplier of the voucher.[1057] Under Article 226(6) of the EU VAT Directive, such invoices should contain 'the quantity and nature of the goods supplied or the extent and
nature of the services rendered'. It may prove difficult to put this information about a future 'underlying' transaction on an invoice at the time of issuing or transferring the SPV.

Also, if a taxable person would redeem an SPV in order to obtain a good, under the EU VAT rules the supplier of that good would not have to issue him an invoice for the supply insofar as it is paid by redeeming the SPV. This is because that supplier shall be deemed to have made the supply of the good related to that voucher to the taxable

1057 See Article 220(1)(a) of the EU VAT Directive.

person that actually issued the voucher (and that will redeem the supplier for accepting the voucher in return for the transfer of the good). This means that, from an EU VAT perspective, the taxable person obtaining the good in return for the SPV is not considered to be the recipient of that good insofar it is 'paid' by using the SPV (he is considered the recipient of the good for the part of it that he does not pay with an SPV). Therefore, under the EU VAT rules, the supplier of the good will have to issue an invoice to the issuer of the voucher for the supply of (part of) that good. The supplier cannot issue an additional invoice for the same (part of that) transaction.

If the purchaser of the good has insured the good, and if during the period covered by that insurance something happens to that good which allows the owner of the good to be reimbursed by the insurance company, the insurance company will normally ask for proof of purchase of that good, also to determine the value. The insurance company will, after all, have to establish that the purchaser is entitled to his claim. However, as a result of the EU VAT rules, the purchaser of the good does not hold a valid VAT invoice for this purchase, or at least not the part of it that he paid using an SPV. This means that the insurance company may need other documents, that the original supplier of the good will have to issue. This adds another layer of complexity to voucher transactions, which was probably not intended by the EU legislator.

Under Article 30b(1), second paragraph, of the EU VAT Directive, where a transfer of a single-purpose voucher is made by a taxable person acting in the name of another taxable person, that transfer shall be regarded as a supply of the goods or services to which the voucher relates made by the other taxable person in whose name the taxable person is acting.

Article 30b(1), third paragraph, of the EU VAT Directive ensures that where the supplier of goods or services is not the taxable person who, acting in his own name, issued the single-purpose voucher, that supplier shall however be deemed to have made the supply of the goods or services related to that voucher to that taxable person. This provision basically ensures that the issuer of the SPV can actually make the 'underlying' supply of goods or services that he is deemed to be making when issuing the SPV, because these good or services are actually (deemed to be) supplied to him by the business supplying these goods or services upon redemption of the SPV.

9.5.2.4 The VAT treatment of redeeming SPVs that were issued for consideration

Insofar as an SPV is used for obtaining goods or services by the holder of the SPV, the actual handing over of the goods or the actual provision of the services shall not be regarded as an independent transaction under Article 30b(1) of the EU VAT Directive. Instead, where the issuer reimburses the business accepting the SPV for his actual supplies, these underlying goods or services are deemed to be supplied to the issuer of the SPV reimbursing the business accepting the SPV.

The above means that, for example, where a business would accept an SPV with a face value of 10 in return for a good with an advertised price of 15, and the remaining amount is paid in cash, the business making that actual supply is considered to make a supply of the good to the person physically receiving the good but only insofar as the

good is paid in cash. If he is reimbursed by the issuer of the SPV, the good will be deemed to be (also) supplied to the issuer of the SPV, for the amount of the reimbursement. This means that even though there is only one 'physical' supply, from an EU VAT perspective, two supplies of goods were made to different recipients.

9.5.2.5 The VAT treatment of issuing and transferring SPVs for no consideration

Even though I consider vouchers that are issued or transferred free of charge not to be 'vouchers' within the definition as provided in Article 30a of the EU VAT Directive, as I explained in Section 9.5.1, I will research the VAT treatment of issuing free SPVs as if they were vouchers under that definition because some EU Member States adhere to that view.

Under Article 30b of the EU VAT Directive, issuing or transferring a free SPV by a business acting in his own name shall be regarded as a free supply of the goods or services to which the voucher relates. Under Article 16 of the EU VAT Directive, the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.

This means that if the free SPV relates to a good or goods, issuing or transferring the voucher can lead to taxation of the free supply of those goods if they are not samples or gifts of small value, and insofar as the VAT on those goods was deducted. For the VAT treatment of free goods, I refer to Section 6.3.3.3.

When I test this against the purpose of EU VAT, which is taxation of expenditure for private local consumption, as well as the economic and commercial realty of issuing SPVs free of charge, I am of the view that this should never be taxed. There is no expenditure, because the SPVs are given away for free. Taxing the promise of a free supply of a good is not in line with that purpose. The economic and commercial reality of the transaction is that a promise is made for a future free supply, but this supply is not yet made and may never be made. This should not be taxed.

If the free SPV relates to services, in my view, issuing or transferring the SPV should not lead to taxation under the current rules. After all, under Article 26 of the EU VAT Directive, performing services free of charge is only considered taxable if performed for the private use of the taxable person or for that of his staff or, more generally, for purposes other than those of his business. Issuing free SPVs for promotional activities will, in my view, always be done for business purposes.

One of the key effects of using vouchers, including SPVs in many EU Member States before 1 January 2019, was the timing difference between receiving payment and actually performing a taxable transaction (upon redemption. It has proven possible to apply the EU VAT concept of amalgamation, as described in Section 4.2.1.2, to

supplies that do not occur simultaneously. The CJEU decided as much in the Levob-case,[1058] where a business first sold standard software, which qualified as a supply of a good, followed by a service where that business customised the software to the needs of the client. These two consecutive supplies were considered one single, amalgamated, supply. However, the consecutive supplies were part of a single agreement that lead to an agreed result. In its case law on absorption, as described in Section 4.2.1.1, the CJEU has not ruled any cases where the supplies were made consecutively. These cases are also all about combinations of supplies that were agreed upfront and where all elements were part of the agreement.[1059] I described these situations of consecutive supplies that can be considered one, composite, supply either through absorption or amalgamation in Section 4.4. In the Kuwait Petroleum case,[1060] the promotional goods were not part of the agreed supply of the petrol and they were supplied separate from the supply of the petrol. Under Article 30b of the EU VAT Directive, however, where SPVs are given away for free with certain supplies of goods or services for consideration, the 'promotional gifts' are deemed to be supplied at the same time as the 'main' supply, i.e. at the time of issuing the SPV. This raises the question whether the supply of these promotional goods can be absorbed into the supply of the main goods or services, if these promotional goods are not an aim in themselves, but rather means of better enjoying the main supplies. I see no reason not to apply the EU VAT concepts of absorption or amalgamation to situations where an SPV is supplied together with a supply that is (also) performed for consideration. In Section 4.5.2 I describe situations where elements to a composite supply that are advertised as 'free' should still be considered to be included in the total, composite supply. Where the EU VAT Directive has the effect that supplies are considered to be made simultaneously, the principle of VAT neutrality, in the sense that similar transaction should be treated the same from a VAT perspective, requires that absorption and amalgamation can also be applied to these transactions.

9.5.2.6 The VAT treatment of redeeming SPVs that were issued for no consideration

Under Article 30a(1) of the EU VAT Directive, the actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

However, under the rationale that I propose above in Section 9.5.2.5, the actual redemption of a free SPV against goods or services should be covered by Articles 16 and/or 26 of the EU VAT Directive, because this is actually the transaction where goods or services are the application and/or use of goods for private purposes and the supply of services carried out free of charge.

1058 CJEU case C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:649.

1059 For examples of CJEU cases where one or more 'ancillary' supplies were absorbed by a 'main' supply, see joined cases C-308/96 and C-94/97, Commissioners of Customs and Excise and T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel (Case C-308/96), and between T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel, and Commissioners of Customs and Excise (Case C-94/97), ECLI:EU:C:1998:496 and case C-349/96, Card Protection Plan Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:93 and C-392/11, Field Fisher Waterhouse LLP v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2012:597.

1060 CJEU case C-48/97, Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203.

I've tried to come up with an example of a free SPV with a fixed monetary value that can be used as partial payment for a supply that costs more than the fixed monetary value, but I couldn't because in all my examples, it was impossible to determine the cost (price) of the underlying supply at the time of issuing the voucher which means that the voucher actually qualified as an SPV. Let's, however, consider an example where a free SPV with a face value of 10 is used as part payment for a supply of a good by the issuer of that SPV with a value of 100. For the issuer of the SPV, the economic and commercial reality of this transaction is that he sells a good with an advertised value of 100 for which he effectively receives 90. The taxable amount for this supply should therefore be 90 less the VAT on that supply. This is also in line with the purpose of EU VAT, which is taxing expenditure for private local consumption. In this case, the expenditure for that consumption is 90 and not 100. This implies that issuing free SPVs should not be taxed.

9.5.2.7 The appropriate EU VAT treatment of transactions involving SPVs (summary)

As I mentioned in Section 9.5.2.3, the provision in Article 30b of the EU VAT Directive that dictates that each transfer of a single-purpose voucher made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the voucher relates was probably included to avoid any discussions on the VAT treatment of breakage. I also held in that Section that even though this provision is tenable when tested against the EU VAT purpose of taxing expenditure on local private consumption, in my view, the economic and commercial reality of SPV transactions would be better reflected if payment for these SPVs was treated as 'prepayments' for VAT purposes.

9.5.2.8 The VAT treatment of voucher transactions involving MPVs

9.5.2.9 What is an MPV?

Under Article 30a of the EU VAT Directive, an MPV is a voucher that is not an SPV. This means that it does have to meet all relevant requirements for being considered a voucher as such, meaning that it should qualify as an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument. However, the place of supply of the goods or services to which the voucher relates, or the VAT due on those goods or services, are not known at the time of issue of the voucher.

9.5.2.10 The VAT treatment of issuing and transferring MPVs

Under Article 30b(2) of the EU VAT Directive, the issue or transfer of an MPV shall not be subject to VAT. Where a transfer of an MPV is made by a taxable person other than the taxable person that issued the voucher and that actually hands over the goods or actually provides the services in return for the MPV (accepting it as consideration or

part consideration), any supply of services that can be identified, such as distribution or promotion services, shall be subject to VAT.

This means that issuing and transferring MPVs is not subject to VAT, unless a specific service, such as a distribution service or a promotion service, is specifically agreed and made for consideration. This means that from an EU VAT perspective, it is irrelevant whether MPVs are issued for consideration or not, because the issue or transfer as such is not subject to VAT.[1061]

This VAT treatment is in line with the purpose of EU VAT, since no expenditure is made (yet) for local private consumption, which means no taxation should occur (yet). Also, the economic and commercial reality of issuing MPVs is that no actual supplies are made (yet), which confirms that no taxation should occur at this stage of the voucher transaction chain.

9.5.2.11 The VAT treatment of redeeming MPVs

Under Article 30b(2) of the EU VAT Directive, the actual handing over of the goods or the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier shall be subject to VAT. At that time, the nature of the supply will have to be determined in order to apply the correct VAT treatment.

Non-redemption, and the breakage that is a result of that, does not trigger any VAT consequences. Breakage is payment received for an activity that is not subject to VAT. Although it could be argued that an activity that is not subject to VAT qualifies as a non-economic activity, I would say that issuing MPVs, especially as part of a promotional activity, is only done to increase the taxed business activities and therefore the MPV related activities all fall within the scope of VAT, even though not all activities are subject to VAT.

Article 73a of the EU VAT Directive dictates that the taxable amount of the supply of goods or services provided in respect of an MPV shall be equal to

a) the consideration paid for the voucher or, in the absence of information on that consideration,
b) the monetary value indicated on the multi-purpose voucher itself or in the related documentation,

less the amount of VAT relating to the goods or services supplied.
If the actual handing over of the goods or the actual provision of the services in return for an MPV accepted as consideration or part consideration is not done by the business that issued the MPV for consideration, the supplier of the goods or services may have to pay VAT based on the consideration paid for the voucher or its monetary value, even if the amount he receives as reimbursement is lower than either of those two amounts. This is not in line with the result of the CJEU's Argos-case[1062] and the

1061 This does not mean that I thing that free vouchers qualify as vouchers, as I explained in Section 9.5.1.

1062 CJEU case C-288/94, Argos Distributors Limited and Commissioners of Customs and Excise, ECLI:EU:C:1996:398.

Yorkshire Co-operatives-case,[1063] where the CJEU held that the sum of the reimbursement received for accepting the vouchers constitutes (part of the) taxable amount for a supply using MPVs. This is based on Article 73 of the EU VAT Directive, which stipulates that the taxable amount is the consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party. This is not the amount received by someone else in the 'voucher chain' nor the monetary or face value of the MPV.

However, using 'the amount paid by for the voucher' could be in line with the purpose of EU VAT, i.e. taxation of expenditure for local private consumption, in cases where the final customer actually purchases the MPV. In those cases, the expenditure of the final customer should be taxed, because in the end that is what he paid for obtaining the relevant goods or services upon redemption of the MPV.

On the other hand, the economic and commercial reality of transactions involving MPVs is that in my above example, the business that is reimbursed for accepting the MPV by the issuer of the MPV may have to pay more VAT than he would have to pay if the same client would not have used an MPV but cash to purchase the goods or services. In my view, however, the lower amount received by the supplier of the goods or services can be compared with the business in the Bally-case[1064] that received a lower amount than the advertised and agreed sales price of his products because of an agreement with a credit card company, that withheld some funds for its services. In that case, VAT was also due on the actual sales price of the goods and not the amount received from the credit card company. The sum so deducted should be included in the taxable amount on which the supplier, as the taxable person, must pay tax to the revenue authorities.[1065] The lower amount in the Bally case was the result of deducting an agreed fee amount for services performed by the credit card company from the amount to be received as consideration for the supply made by Bally. The CJEU simply decided that a consideration paid for a service received by a taxable person cannot lower the taxable amount for a supply made by that taxable person. For transactions involving MPVs, the lower amount can also be the result of such agreed services.[1066] In my view, the lower amount can also be the result of settling the

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1063 CJEU case C-398/99, Yorkshire Co-operatives Ltd and Commissioners of Customs & Excise, ECLI:EU:C:2003:20, paragraph 20 ("… The coupons substantiate the retailer's right to receive from the manufacturer a reimbursement in the amount of the reduction granted to the final consumer. It follows that the sum represented by the nominal value of those coupons constitutes for the retailer an asset item realised on their reimbursement and that they must be treated, to the extent of that value, as a means of payment").

1064 CJEU case C-18/92, Chaussures Bally SA and Belgian State, ECLI:EU:C:1993:212.

1065 CJEU case C-18/92, Chaussures Bally SA and Belgian State, ECLI:EU:C:1993:212, paragraph 18.

1066 See, for example, Article 30b(2): "… any supply of services that can be identified, such as distribution or promotion services, shall be subject to VAT".

consideration for the supply of goods or services with an 'implied' service by the business paying the reimbursement.[1067]

9.5.2.12 The appropriate EU VAT treatment of transactions involving MPVs (summary)

Based on the above and taking into account the purpose of EU VAT and the economic and commercial reality of transactions involving MPVs, in my view the VAT treatment of these transactions under current law is appropriate.

9.5.2.13 The appropriate EU VAT treatment of voucher transactions

In this Section I came to the following conclusion:

- free vouchers should not be considered vouchers under the EU VAT definition thereof, also meaning that issuing SPVs for no consideration should not be taxed;
- the appropriate VAT treatment of SPV transactions is to consider payments for SPVs prepayments for the underlying, future supplies for EU VAT purposes
- the current VAT treatment of MPV transactions (no taxation on issuing or transferring the MPVS, taxation upon redemption of the MPVs) is already appropriate.

9.5.3 Is a definition of voucher in the EU VAT Directive necessary under appropriate law?

The appropriate VAT treatment of voucher transactions from Section 9.5.2 strengthens me in my view that a definition of 'voucher' is not necessary, and may even be confusing and therefore not desirable, from an EU VAT perspective. In my view, a definition of 'voucher' is not required for determining the VAT treatment of transactions involving vouchers. From the above, it is clear that the term 'voucher' has many different meanings, which would make it hard to give a good definition of 'voucher' (or to define which 'vouchers' are not covered by the definition provided).[1068] Also, VAT is due on transactions (supplies),[1069] irrespective of whether vouchers are used as part of these transactions. The fact that vouchers are involved may have VAT consequences, but these can be solved without a definition of 'voucher', as I will demonstrate below.[1070]

1067 See also CJEU joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590.

1068 It is, of course, possible to have a definition of a voucher, but this definition is bound not to include many of the types of vouchers that exist, as I will demonstrate below.

1069 As well as the intra-Community acquisition and the importation of goods.

1070 The fact that taxing transactions involving vouchers is not simple, is supported by the large amount of literature on this topic. Examples are: Millar, Rebecca M., The Vouchers Problem: An Insoluble Conflict or an Illustration of the Nature of Consideration in the 'Complex Parallel Universe' of Gst?. Australian Tax Forum, Vol. 18, No. 107, 2003, Melanie Hall QC and Ian Hutton, Avoiding VAT Liability On Face Value Vouchers, The Tax Journal, 2002, 22 July 2002, p. 11-14, W. van der Corput, Astra Zeneca - The VAT Treatment of Vouchers, 21 Int. VAT Monitor 5, p. 365-369 (2011), Journals IBFD, Jeroen Bijl, 'VAT: 'Money Off Vouchers' and 'Cash Back Schemes' – What Are the Problems and How Can They Be Solved?' (2012) 21 EC Tax Review, Issue 5, pp. 262–276, Jeroen Bijl, 'VAT, Vouchers, Rights and Payments: The VAT Treatment of Vouchers' (2013) 22 EC Tax Review, Issue 3, pp. 115–130, J. Bijl, The European Union's New VAT Rules for Vouchers: The Emperor's New Clothes?, 27 Intl. VAT Monitor 2, p. 95-

Also, there are transactions that do not involve vouchers but that should be treated the same as transactions involving vouchers anyway, which is also an indication that a 'voucher' as such should not have a VAT treatment, but rather that only the underlying transaction itself is relevant for VAT purposes.

It is also impossible to exclude that in the future, even more types of transactions involving vouchers will be conceived that may not be covered by any definition that would cover the current voucher transactions. In my view, therefore, there is no need for a definition of a 'voucher'. This can only complicate matters.

However, because of the (perceived) absence of common rules regarding the VAT treatment of voucher transactions, which has led to Member States developing their own practices,[1071] some rules and official guidance may be needed in order to ensure that all transactions involving vouchers have the same VAT treatment throughout the EU. This guidance should focus on the VAT treatment of the underlying transactions and the consideration paid for these transactions rather than the fact that vouchers are involved.

9.6 The VAT treatment of vouches that are not vouchers under the definition in the EU VAT Directive

In Section 9.6 I research the VAT treatment of transactions involving vouchers that are not vouchers under the definition of Article 30a of the EU VAT Directive. I will examine four types of vouchers: tickets and stamps, discount vouchers, discount cards and so-called "vouchers-for-cash".

9.6.1 Transport tickets, admission tickets to cinemas and museums, postage stamps or similar

The fifth recital in the preamble to the definitive 'VAT Voucher Directive'[1072] states that the provisions regarding vouchers should not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps or similar. Although no explanation was given as to why these instruments are not affected by the rules in the EU VAT Directive on the VAT treatment of voucher transactions, it is clear that these instruments are not covered by the definition of 'voucher' in Article 30a of the EU VAT Directive. Businesses have no "obligation to accept it as consideration or part consideration for a supply of goods or services".[1073] These instruments rather represent proof that a payment was made for a future

97 (2016), Journals IBFD and G. Echevarría Zubeldia, VAT Recoverability of Unredeemed Single Purpose Vouchers, Int'l VAT monitor 5, p. 359-361 (2017).

1071 From the European Commission's Press Release of 10 May 2012 about the proposal, with reference number IP/12/464. The full press release can be found on line: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/464&format=PDF&aged=1&language=EN&guiLanguage=en (last visited on 14 March 2019).

1072 Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers, OJ 2016, L 177, p. 9-12.

1073 See Article 30a of the EU VAT Directive.

transaction, e.g. admission to a means of transport that ensures that the holder is transported to the agreed destination, the admission to a cinema to watch a certain film on a certain date at a certain time, to be admitted to a museum and to have mail sent to a specific destination. These services all seem to be covered by the outcome of the Air France-KLM case, where the CJEU ruled that "the airline company fulfils the service by enabling the passenger to benefit from those services"[1074] and that "the airline company which sells a transport ticket fulfils its contractual obligations where it puts the passenger in a position to claim his rights to the services provided for by the transport contract".[1075]

Issuing these vouchers (admission tickets, stamps and similar instruments) for consideration should trigger the VAT on the amount of consideration received to become payable under Article 65 of the EU VAT Directive. At the moment that the businesses 'fulfil the service by enabling their customers to benefit from those services' and 'put their customers in a position to claim their rights to the service provided by those businesses', the service is deemed to be performed. Only if, for example, a business would go bankrupt after receiving the prepayment but before 'fulfilling the service', a right to recover overpaid VAT should exist because the relevant taxable supply was never made.

The taxable amount for the supply is the payment actually received for the instruments, less the VAT on those services. If these vouchers are provided free of charge, the VAT treatment of the supply to which the voucher relates is determined in Articles 16 and 26 of the EU VAT Directive. The supply of free goods should be taxed, unless the goods qualify as gifts of small value or as samples.[1076] The supply of free services is only subject to VAT if made for purposes other than those of the business making the supply of those services.[1077]

9.6.2 Discount vouchers

When a business accepts vouchers in return for a supply, without receiving any compensation/consideration for accepting the voucher, the business will either grant a discount or rebate (if a payment has to be made by the customer) or it will make a free supply of goods or services.

As mentioned, the VAT treatment of transactions involving these vouchers is not explicitly included in the EU VAT Directive. This means that businesses performing these transactions should rely on the more general relevant provisions in the EU VAT Directive as well as the relevant CJEU case law on discounts as researched in Section 5. In many of the relevant CJEU cases, vouchers or similar instruments were used.[1078]

1074 CJEU joined cases C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841, paragraph 28.

1075 CJEU joined cases C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics, ECLI:EU:C:2015:841, paragraph 42.

1076 See Section 6.4.2.

1077 See Article 26 of the EU VAT Directive.

1078 See, for example, CJEU cases C-126/88, Boots Company plc v Commissioners of Customs and Excise, ECLI:EU:C:1990:136, C-288/94, Argos Distributors Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1996:398, C-317/94, Elida Gibbs Ltd v Commissioners of Customs and Excise, ECLI:EU:C:1996:400, C-48/97, Kuwait

From these cases, it is clear that issuing discount vouchers is not a supply that is subject to VAT and that redeeming these vouchers decreases the taxable amount for the discounted supply.

Where a discount voucher is issued for consideration, the taxable amount for the supply for which the discount voucher is used is the actual payment received by the supplier, including the consideration received for issuing or accepting the discount voucher.

In Chapter 5, I introduced the solution of 'joint payment, shared liability' to solve the VAT issues regarding 'leap-frog discounts'. In my view, the solution of 'joint payment, shared deduction' as introduced in that Section is in line with the purpose of EU VAT, which is the taxation of expenditure for local consumption. Where a transaction takes place for which a money off discount or cash rebate, using a voucher, is granted in a different tax jurisdiction than the country where the business paying (finding) those discounts and rebates is established, the VAT consequences of the funding should be accounted for in the country where the final customer is established.

9.6.3 Discount cards

There are also voucher schemes where the issuer, as a form of business promotion, sells vouchers that allow the holder a form of discount at other businesses, where the issuer of the voucher does not indemnify the businesses accepting these vouchers (or vice versa).[1079] The rationale behind this type of voucher scheme lies in the fact that the business selling the vouchers is considered to promote the businesses that agree to accept the vouchers, because people will have to go to those businesses to redeem the vouchers and often (have to) purchase more than only the free or discounted products or services, and may well become regular customers of those businesses.

I am of the view that where the business making a supply in return for which it (also) accepts a voucher without being reimbursed for accepting that voucher (i.e. the business did not issue it for consideration nor is it reimbursed by the issuer of the voucher for accepting it), this voucher is not 'accepted as consideration or part consideration for a supply of goods or services',[1080] meaning that it does not qualify as a voucher under the current EU VAT rules (from 1 January 2019).

The CJEU decided a case that deals with this type of voucher scheme: the Granton-case.[1081] However, the questions referred to the CJEU only focussed on whether a VAT exemption could apply to the transactions performed by the issuer of these types

Petroleum (GB) Ltd v Commissioners of Customs & Excise, ECLI:EU:C:1999:203, C-427/98, Commission of the European Communities v Federal Republic of Germany, CLI:EU:C:2002:581, C-398/99, Yorkshire Co-operatives Ltd v Commissioners of Customs & Excise, ECLI:EU:C:2003:20, C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, C-270/09, Macdonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780.

1079 CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

1080 See Article 30a(1) of the EU VAT Directive (from 1 January 2019).

1081 See CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

of vouchers. In that case, the vouchers sold by the issuer gave the holder the right to not pay the full advertised (shelf) price of items (goods or services) sold by participating businesses. In its ruling, the CJEU makes clear that it considers the sale of such vouchers to be a service that is not VAT exempt, and that the taxable amount for the service is the full amount received by the issuer.[1082]

Even though the voucher is, as a general rule, not the purpose or object of a transaction,[1083] in my view, it is in this situation. From the perspective of the issuer of the voucher, issuing it is more the provision of an advertisement service paid by potential customers of a business than a voucher scheme in the sense of the schemes I described before. Therefore, I am also of the view that the supply of the voucher by the issuer should be considered a supply of a service, which is not VAT exempt.

The only issue that I have with this outcome occurs where issuing the voucher is subject to the standard VAT rate, and the supply of the goods or services for which it is redeemed has a different VAT treatment. In that case, if a customer would purchase a voucher and use that voucher to purchase a good or service that is subject to a lower VAT rate at a discounted price, would spend, in his view, an amount that is partially subject to the standard VAT rate and partially to the lower VAT rate. This is, however, unavoidable, because I cannot find any grounds to argue that the sale of this type of voucher should not be subject to VAT. This anomaly can potentially lead to VAT planning ideas, where a business that is unable to fully deduct VAT purchases a voucher from a (sufficiently) unrelated party to use as the right to a discount. In that case, it could possibly incur a lower amount of non-deductible VAT than if it would have paid the full price to the seller of the goods or services. This could, for example, be used by government bodies to avoid making a local intra-Community acquisition of a good from a jurisdiction with a lower VAT rate, where the threshold for making intra-Community acquisitions under the EU VAT rules would otherwise be exceeded.[1084] In this case, transforming part of the payment from a payment for a supply of goods to payment for a supply of services could save VAT. As I mentioned before, I don't see how this can be avoided under the rules in the EU VAT Directive. The planning idea itself could possibly be countered by the principle of 'prohibition of abuse of law'. This goes outside the scope of my research and therefore I will not further investigate this.

9.6.4 Vouchers-for-cash

This Section is about businesses that issue vouchers with a fixed or nominal value, for consideration, where the voucher entitles the holder to exchange it for a higher amount of money than the (total) nominal value at the issuer of the voucher.

These vouchers, often in the form of trading stamps, are usually purchased for a small consideration together with the supply of goods or services, and a certain specific, agreed amount of vouchers can be exchanged for a cash amount that is slightly higher

1082 See CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745, paragraph 33.

1083 See Section 9.3.

1084 See Article 3 of the EU VAT Directive.

than the total amount paid for the collected vouchers together.[1085] For the businesses that issue these vouchers, this is just another loyalty scheme involving vouchers. For the purchasers of these vouchers, this scheme resembles saving money in return for interest. Be that as it may, in my view, this voucher scheme is not a VAT exempt financial transaction.[1086]

The difference between the amount of money that is paid for the vouchers and the money that is received upon redemption is a reward in cash paid by the business in return for consumer loyalty. People cannot deposit random amounts of money at the business in return for vouchers and expect a higher payment at a later stage: vouchers can only be purchased if a certain amount of money is spent on products (goods or services) from the business. From an economic perspective, the business could have also just given away the vouchers for free and paid the 'extra amount' upon redemption. The fact that vouchers have to be purchased has two advantages for the business: the business has the money at its disposal, enabling it to use it as working capital, which has a certain value, or to invest in order to try to earn at least the 'extra amount' that has to be paid upon redemption. The other advantage is that there will always be people that do not redeem the vouchers,[1087] thereby forfeiting their right to the money paid for the vouchers. This means that the scheme creates both a cash flow as well as a real cash advantage to the business, besides stimulating customer loyalty, which is meant to increase turnover as well. Therefore, this voucher scheme is based on an entirely different business model than plain 'saving money for interest'.

The payment itself does, in my view, not create any VAT liabilities because in most cases, the underlying agreement will not explicitly include that the money is consideration paid in return for customer loyalty. I consider it payment for being (and staying) a customer, which is outside the scope of VAT.[1088] This means that the money paid back (or the margin) should also not be considered a discount that should be divided equally over the purchases that were made together with the issue of the vouchers.

9.7 The issuing and transfer of vouchers should not be subject to VAT

Based on the my research of the appropriate VAT treatment of voucher transactions in Sections 9.1 to 9.6, I come to the conclusion that under appropriate law, issuing and transferring vouchers should not be subject to VAT. In this Section (9.7) I will provide additional basis for that conclusion.

Not only the issuing of a voucher, but also the (subsequent) transfer of a voucher by someone else than the issuer should, in my view, not be considered a transaction that is subject to VAT: a voucher, in my view, is never the actual 'purpose' or 'object' of a

1085 For more information about these vouchers, I refer to the following website, only available in Dutch: http://www.bezuinig.nl/koopzegels.html

1086 See Article 135(1)(b) of the EU VAT Directive.

1087 They may, for example, lose them.

1088 CJEU case C-409/98, Commissioners of Customs & Excise and Mirror Group plc, ECLI:EU:C:2001:524, par. 26 and 27.

voucher transaction, as I explained in Section 9.3.3. Also, the issue or transfer of a voucher should, in my view, not be considered a 'separate' transaction 'in its own right', but rather a step in or towards the supply of goods or services that that it relates to, meaning that the issue or transfer as such should not be subject to VAT.

It can be argued that this is different for certain types of voucher, for example where a voucher that is issued for consideration entitles the holder a discount to multiple (or an unlimited amount of) transactions at a specific (chain of) shop(s), e.g. for a certain period of time, or where a business sells a voucher that can be redeemed for goods or services at another business and these businesses do not pay or settle any amounts between them.[1089] However, I would argue that even in these cases, the voucher is only a means to prove that said right to discounts or supplies exists, rather than the object of the transaction. The (taxable) transfer of the right to those discounts happens to be transferred at the same time as the instrument that is used as proof of entitlement to those rights. Conceptually, these 'rights' could also be transferred and proven by electronic means, e.g. by storing the relevant details of the holder to those rights to be checked upon use or redemption, proving that the voucher itself is not the object or aim of the transaction.

9.7.1 The supply of a voucher as such should not be considered a supply that is subject to VAT because transferring a voucher is neither the supply of a good nor a service

Only the supply of goods and services are subject to VAT.[1090] Goods are tangible objects, which means that if anything, the supply of a vouchers as such would be considered the supply of a service.[1091] Even though the CJEU has, in one case, stated that the supply of a voucher is indeed a taxable supply of a service,[1092] in my view, this is not a correct assertion, as is also apparent from the fact that the CJEU has often ruled that the supply of voucher is actually not a taxable supply at all.[1093]

As mentioned in Section 9.5.2.3, I also don't agree with the current EU VAT treatment of issuing and transferring SPVs, which dictate that this should be treated as the supply of the goods or services to which the SPV relates.

A voucher is an instrument that embodies or evidences the right of the holder of that voucher to be the recipient of a supply of goods or services, or of a preferential treatment, e.g. a discount on the price of an underlying transaction. In Section 9.3, I described the reasons why, in my view, the supply of a voucher should not be

1089 See CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

1090 Also, the intra-Community acquisition of goods and the importation of goods are subject to VAT, provided that certain other requirements are met.

1091 Although many voucher have a physical form, this is not a characteristic of a voucher nor necessary – electronic vouchers serve the exact same purpose. The value of the 'carrier medium' that is a voucher does not correspond with the actual face value (or other value) that the voucher 'represents'.

1092 CJEU case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, par. 26-27.

1093 In the same sense, see W. van der Corput, Astra Zeneca - The VAT Treatment of Vouchers, 21 Int. VAT Monitor 5, p. 365-369 (2011), Journals IBFD.

considered the supply of a service (i.e. the transfer of a right). Basically, this can be traced back to the fact that fact the supply of a voucher is not the actual 'object' of a supply for VAT purposes, where the supply of other 'rights' are supplies that are subject to VAT in their own right, such as the supply of intellectual property rights or the right to use a good for a specified period of time.[1094] In these situations, the supply results in actual 'consumption' (as an EU VAT concept), as I will now explain.

9.7.2 The supply of a voucher should not be considered a supply that is subject to VAT because there is no consumption

VAT is a general tax on consumption,[1095] and the supply of a voucher for consideration is not a transaction that embodies consumption. Rather, it is a 'step towards consumption' or 'a narrowing of the spending possibilities of the holder of the voucher'. From a VAT perspective, a complete taxable transaction has taken place only when the voucher is redeemed for actual goods or services.[1096,1097] This is also the view of the CJEU, as I will show below. In other words, from a 'consumption' perspective, the supply of a voucher is only part of a (chain of) transaction(s) that lead(s) to a supply of the goods or services that can be consumed.[1098]

A transaction that does not entail any benefit which would enable anyone to be considered consumer of supply of good or services should not be subject to VAT.[1099] Some argue that this is not a general principle of law, but that it is based on the legal character of VAT as laid down in the VAT Directive[1100] and therefore part of the fundamental framework of VAT.[1101] Be that as it may, I consider it a relevant principle for VAT.[1102] This is also in line with my 'purpose of the EU VAT'-test: the purpose of EU VAT is the taxation of expenditure for local private consumption. Payment for the issue or transfer of a voucher may be expenditure, but taxation cannot occur without a taxable event such as the supply of goods or services. At the moment of that supply, the purpose of the VAT is fulfilled, even though the VAT may become chargeable at the time of the payment if it qualifies as prepayment for VAT purposes.

1094 See, in the same sense, P. Gallagher, R. Cordara, Supply of Rights and Rights to a Supply, 22 Intl. VAT Monitor 1, p. 12-16 (2011), Journals IBFD.

1095 See Article 1(2) of the EU VAT Directive.

1096 The EU VAT rules for vouchers as applicable from 1 January 2019 dictate that the issuing and the supply of a 'single-purpose voucher' is actually regarded as a supply of the goods or services to which the voucher relates. I note that apparently a specific provision is required to realize this outcome.

1097 This principle also underlies Article 30b(2) of the EU VAT Directive (from 1 January 2019): "The actual handing over of the goods or the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier shall be subject to VAT pursuant to Article 2, whereas each preceding transfer of that multi-purpose voucher shall not be subject to VAT".

1098 This is different from, for example, the supply of shares, because shares are the aim or object of a supply. The shares give the holder certain powers and/or rights, such as the right to a vote in the shareholders meeting, the right to receive dividends etc. The supply of shares (for consideration, by a taxable person acting as such) is a (VAT exempt) taxable transaction.

1099 CJEU case C-215/94, Jürgen Mohr and Finanzamt Bad Segeberg, ECLI:EU:C:1996:72, paragraph 22.

1100 Article 2(1) of the First Council Directive (67/227/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967 (I), p. 14) and currently in Article 1 of the EU VAT Directive.

1101 A.H. Bomer, De doorwerking van algemene rechtsbeginselen in de BTW (Application and role of general principles of law within VAT), only available in Dutch with an English summary), Deventer, Kluwer 2012, p. 32.

1102 See Chapter 1.4 for the framework and referencing system for this research.

The fact that, for various reasons, transactions are divided into separate elements, separating payment and supply or granting the right to a discount and the supply to which it applies, does not make that the part(s) of the (total) transaction that is (are) not the actual, underlying supply should be subject to VAT, because there is no consumption (yet), and nor is there a transaction that is subject to VAT. The term 'consumption' should be interpreted as 'the supply of goods or services to an identifiable consumer or any benefit capable of being regarded as a cost component of the activity of another person in the commercial chain'.[1103] The issuing or supply of the voucher is only a part of or a step in that total transaction.

This view is supported by the CJEU in the Argos-case[1104] where it decided that the taxable amount for a supply (of goods or services) in return for a voucher is the 'actual money equivalent' of that voucher, which is the money actually received for (issuing, supplying or accepting) that voucher.[1105] This can only be the case if a direct link exists between the payment of that money (equivalent) and the underlying supply of goods or services. Under the current EU VAT rules, for a payment to be a consideration for a supply, there has to be a direct link between the supply and the payment.[1106] Otherwise, two supplies should have been identified: one supply of a voucher for money, the taxable amount being the money received for the voucher, and one supply of goods in return for a voucher, which has to be considered a barter transaction because no money is involved, and for barter transactions, the taxable amount is the cost or purchase price of the supply.

Even though the MacDonald Resorts-case does not explicitly concern vouchers as such but 'points' or 'Points Rights' that can be purchased and which can be redeemed at a later time,[1107] which in my view qualify as a species of vouchers but that were not qualified or recognised as such in the relevant case, this case does confirm the above view. In the MacDonald Resorts-case, the CJEU held the following in relation to the relevant transactions: "(…) the customer completes the first transaction not to collect points, but with the intention of temporarily using accommodation (the underlying service, JB) or of obtaining other services which he will choose at a later date. Therefore, the purchase of 'Points Rights' is not an aim in itself for the customer. The acquisition of such rights and the conversion of points must thus be regarded as preliminary transactions in order to be able to exercise the right to temporarily use a property, or to stay in a hotel or to use another service. Therefore, it is at the final moment of that conversion that the purchaser of 'Points Rights' receives the consideration for his initial payment."[1108]

1103 CJEU C-384/95, Landboden-Agrardienste GmbH & Co. KG and Finanzamt Calau, ECLI:EU:C:1997:627, paragraph 23.
1104 CJEU case C-288/94, Argos Distributors Limited v Commissioners of Customs and Excise, ECLI:EU:C:1996:398.
1105 CJEU case C-288/94, Argos Distributors Limited v Commissioners of Customs and Excise, ECLI:EU:C:1996:398, paragraph 21.
1106 See Chapter 3.
1107 CJEU case C-270/09, MacDonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780.
1108 CJEU case C-270/09, MacDonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780, paragraphs 24-25.

This means that the issuing or supply of a voucher is only a step towards consumption, or an element of a transaction that still has to be completed. No supply that can be consumed has taken place (yet) at the time of the issuing or supply of the voucher.

Even though issuing a voucher should not be considered a taxable transaction, it should in my view be considered an economic activity within the scope of VAT.[1109] After all, it cannot be denied that issuing vouchers is a business activity, albeit that the payment should be attributed to the subsequent or underlying transaction, which means that, from a VAT perspective, issuing vouchers is not a supply for consideration.[1110] It is possible that this is (one of) the reason(s) that the European legislator decided to consider the supply of a voucher and the subsequent redemption of the voucher (for goods and/or services) as one single transaction in its original proposal for the VAT treatment of voucher transactions.

The fact that issuing and supplying vouchers is an economic activity (albeit not always one that is subject to VAT) means that any VAT incurred on costs related to the issuing or supplying vouchers, also when they are not SPVs, should be deductible. Where the supply or issuing of the voucher is not subject to VAT, the costs related to these activities should be considered 'general costs' or 'overhead costs' of the business. The VAT on these costs can be deducted according to a business' pro-rata, where applicable, because from a VAT perspective, costs cannot be directly attributed to activities that are not taxable activities. These costs can, however, be attributed to the overall economic activities of the taxable person.[1111] Under the view of the Commission in their original proposal, where the issuing of the voucher and the subsequent supply of goods and services is considered one single taxable transaction, VAT on the costs related to the issuing of the voucher can be directly attributed to the 'entire transaction' including the subsequent supply. This means that deduction depends on the nature of the subsequent supply.

9.7.3 CJEU dissenting ruling: the issuing or supply of a voucher is a service that is subject to VAT

Above I briefly described some CJEU cases that deal with the VAT consequences of (specific types of) vouchers. In the Astra Zeneca-case, the CJEU held that the supply of a voucher is a service that is subject to VAT.[1112] I disagree with this view. Even though I cannot prove this, I am convinced that in this specific case, the CJEU was so focused on solving an issue closely linked to a voucher transaction that it completely overlooked the simple fact that the supply of a voucher is not the object of a transaction and therefore not a supply that is subject to VAT. Also, in this case the CJEU applies some logic that – in my view – oversimplifies this type of transactions, by deciding that the supply of vouchers for consideration must be a supply of services since it is not a supply of goods,[1113] and under the EU VAT Directive, a supply of

1109 See Article 9 of the EU VAT Directive.

1110 This is, of course, different if a (separate) fee is charged for issuing the voucher.

1111 CJEU case C-29/08, Skatteverket v AB SKF, ECLI:EU:C:2009:665, paragraph 73.

1112 CJEU case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, par. 26-27.

1113 CJEU case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, par. 25-26.

services is "any transaction which does not constitute a supply of goods".[1114] In this Subsection, I will explain why I think this case should not be applied widely.

The Astra Zeneca-case case precedes the MacDonalds Resorts-case[1115] I described earlier (the case about 'points rights') by about five months only but it was ruled by a different chamber of the CJEU, which may also explain the different outcome. Also, from the facts of this later case (and under the rules applicable in the specific taxable period), it transpires that the business that supplied the vouchers for consideration to its employees actually incurred VAT on the purchase of the vouchers, which is not commented on by the CJEU.[1116] In view of what I established so far in this Chapter, I can only come to the conclusion that this ruling does not seem to fit comfortably in the line of the CJEU's other judgments on this topic.

The Advocate General in in the Astra Zeneca-case acknowledges that the (VAT) chain in this whole transaction is very complex but that there is just one payment of the tax. The VAT on the goods or services purchased from the retailer is incorporated in the voucher and, at the point at which he receives it, providing goods or services in exchange, the retailer 'completes the circle' and pays the VAT collected in supplying the voucher to the intermediary over to tax authorities.[1117] Be that as it may, the Advocate General then dismisses the view that the provision of vouchers falls outside the scope of VAT, arguing that it has the following drawbacks:

First, the Advocate-General argues that this view can only be accepted for the situation in which the consideration for the provision is exactly the same amount as the purchase price of the vouchers. According to the Advocate General, if the supplier of the voucher makes a 'profit', this would be an indication that added value is created for the purpose of VAT legislation, which would give rise to liability to pay tax.[1118] I agree, but in my view the 'profit' or margin between the purchase price and the sales price of a voucher would constitute the consideration for a separate taxable transaction related to the voucher (e.g. marketing, operating, supporting or handling the voucher scheme), whilst the supply/transfer of the actual voucher would remain untaxed, as I explain in Section 9.5.2.11.

Second, the Advocate General argues that the person that purchases and uses the voucher is ultimately liable for the VAT, which can only be the case if this is not 'hidden' in the price of the voucher.[1119] The Advocate General argues that the user (purchaser) of the voucher can only be liable for the VAT if the supply of that voucher

1114 See Article 24(1) of the EU VAT Directive.

1115 CJEU case C-270/09, MacDonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780.

1116 CJEU case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450, par. 12-13.

1117 Opinion of Advocate General Mengozzi in case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:218, par. 46.

1118 Opinion of Advocate General Mengozzi in case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:218, par. 42-43.

1119 Opinion of Advocate General Mengozzi in case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:218, par. 45 and 48.

is actually subject to VAT.[1120] I disagree. The only transaction that needs to be taxed is the supply of goods or services that is 'paid for' with a voucher. And the VAT 'hidden' in the value of (or: paid for issuing or supplying) that voucher is also used to pay for the VAT on that transaction. The value of a voucher is (or can be) a gross (i.e. VAT inclusive) amount if it is redeemed for a taxed supply of goods or services. Taxing the supply of the voucher as well as the supply of the goods or services that are paid for using the voucher would, in my view, lead to double taxation: VAT is remitted to the tax authorities twice: once for the supply of the voucher and once for the supply of goods or services. However, there is only one supply that leads to taxable consumption, and that is the supply of the goods or services. Only that transaction should, in my view, be subject to VAT.

This means that in my view, the CJEU's decision in the Astra Zeneca-case that issuing or supplying a voucher is a service that is subject to VAT, should not be applied widely. It is not in line with other CJEU case law on the VAT treatment of voucher transactions, nor with the economic and commercial reality of voucher transactions or the purpose of EU VAT (taxing expenditure on local private consumption). The economic and commercial reality of voucher transactions is that vouchers as such are not the object of the transactions, and therefore transferring vouchers should not be a taxable supply. Also, as explained above, even though there is expenditure when a voucher is sold, this expenditure does not lead to consumption at the time of making that expenditure, and no taxable supply is made (under current law, this is different for the transfer of an SPV). If anything, also under the purpose of EU VAT, the expenditure should be treated as prepayment for a future supply or a deposit that can be used for a future supply.

9.7.4 Some practical reasons why the issuing of (free) vouchers in itself should not trigger VAT consequences

Besides the fact that in my view, vouchers are not the purpose of transactions that involve the use of vouchers and that, based on economic and commercial reality, transactions that involve the use of vouchers should not be treated differently (from a VAT perspective) than the exact same transactions that don't involve or require vouchers, I will below describe additional reasons why the issuing or supply of a voucher should not trigger any VAT consequences. I will focus on the grounds for not taxing the underlying transaction when issuing an SPV, irrespective of whether it is issued free of charge or for consideration. Obviously, I understand that from 1 January 2019 these transactions trigger VAT consequences, but in my view, under desired or appropriate law, this should not be the case.

9.7.4.1 Return goods

Under the current EU VAT rules, the transfer of an SPV shall be regarded as a supply of the goods or services to which the SPV relates. The actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher

1120 Opinion of Advocate General Mengozzi in case C-40/09, Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:218, par. 49-50.

accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction. Also, where the supplier of goods or services is not the taxable person who, acting in his own name, issued the single-purpose voucher, that supplier shall however be deemed to have made the supply of the goods or services related to that voucher to that taxable person.

I will use the following example to demonstrate how this can lead to practical issues: A business (A) issues an SPV to another business (B) for resale. B sells this SPV to a private individual (P). The private individual redeems the SPV at a third business (C) against a good, for no additional consideration. C is reimbursed by A for accepting the voucher.

From an EU VAT perspective:

- a supply was made by C to A (under Article 30b(1), paragraph 3, of the EU VAT Directive),
- by A to B (under Article 30b(1), paragraph 1, of the EU VAT Directive), and
- by B to P (under Article 30b(1), paragraph 1, of the EU VAT Directive).

Also, from an EU VAT perspective,

- C does not make a supply to P, even though the right to dispose of the good as owner is transferred by C to P.

At some point after the purchase, P decides that she doesn't want the good 'purchased from C' and returns it to C. From an EU VAT perspective, however, C never supplied the good to her. So how does this work, from a VAT perspective? Because C never made a supply to the private individual, there is no supply to be 'undone' or 'credited'. The supply, under the EU VAT rules, was made by B to P, but she cannot return the good to B – she only bought an SPV from B. In my view, the only way to solve this is to reverse the entire chain of (voucher) transactions in order to achieve the desired end-result, i.e. undoing the supply to P.

This may be true under the relevant EU VAT rules, but from any other perspective (commercial, bookkeeping etc.) this does not make a lot of sense. Treating the supply or transfer of an SPV as a prepayment, and only where the person that is bound to make the actual underlying supply, seems a better option because the above would simply be avoided as no supplies would be deemed to be made between parties transferring the SPV. In my view, again, this is more in line with the economic and commercial reality of such voucher transactions.

9.7.4.2 The same voucher can be an SPV or an MPV

Under the EU VAT rules, it can be argued that issuing a voucher free of charge leads to the taxation of the underlying transaction if all relevant requirements are met. This means that if, at the time of issuing the voucher, the voucher (i) qualifies as a voucher and (ii) the taxable amount and the place of taxation of the underlying transaction are known at the time of issuing the voucher, the underlying transaction will be deemed to take place at the time of issuing that voucher.

If the voucher is issued free of charge, the taxable amount for the underlying transaction is determined as follows:
If the underlying transaction qualifies as the supply of a service, the taxable amount shall be the full cost to the taxable person of providing the service.[1121]
If the underlying transaction qualifies as the supply of a good, the taxable amount shall be the purchase price of the good or of a similar good or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.[1122]

This means that where vouchers are issued (or supplied) free of charge, taxation of the underlying transaction can only take place if the exact underlying good or service is known at the time of issuing the voucher. Knowing the applicable VAT rate is not sufficient, not even in a jurisdiction that has only one VAT rate, because if you don't know exactly which good or service will be provided at redemption of the free voucher, the taxable amount of that underlying transaction cannot be determined at the time of issuing the free voucher, and therefore the voucher does not qualify as an SPV. 'Single-purpose voucher' means a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher.[1123] If the taxable amount is not known at that time, neither is the VAT due on those goods or services.

The above provides an additional ground for my view that, under desired or appropriate law, the issuing of an SPV should not trigger the taxation of the underlying transaction. I will use the following example to explain this.

A chain of shops sells goods that are all subject to the same, standard, VAT rate, e.g. clothes.[1124] It also sells face value vouchers that can only be used to obtain clothes from that (chain of) shop(s).
If the shop supplies such a face value voucher for consideration to one of its customers, VAT will be due under the EU VAT rules, because issuing that voucher shall be regarded as a supply of the goods to which the voucher relates[1125] and the taxable amount shall be everything that the shop has received in return for that supply, i.e. the consideration received when issuing the face value voucher. Therefore, the voucher qualifies as an SPV.
If the shop issues that exact same face value voucher to one of its employees for free, the exact same voucher qualifies as an MPV, because at the time of issuing that free voucher the shop does not know exactly which item of clothing the employee will

1121 See Article 75 of the EU VAT Directive.
1122 See Article 74 of the EU VAT Directive.
1123 See Article 30a(2) of the EU VAT Directive.
1124 This specific example obviously does not apply to jurisdictions where the supply of clothes can be subject to different VAT rates, such as the United Kingdom where the supply of childrens' clothes is zero-rated. For those jurisdictions, a different type of business should be used for this example.
1125 See Article 30b(1) of the EU VAT Directive.

redeem the voucher for. This means that the taxable amount cannot be determined at the time of issuing the voucher, because the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, of the good to which the voucher relates cannot be determined at that time.
This means that the exact same (face value) voucher can be an SPV or an MPV, depending on whether it is issued for consideration or not.

Treating the same voucher as an SPV when issued for consideration and as an MPV when provided free of charge means that businesses will have to be able to process this in their bookkeeping systems. In my view, allowing the transfer of one item to have two completely different VAT treatments is not in line with one of the aims of the EU VAT Directive, which is 'to achieve the highest degree of simplicity and of neutrality', according to recital 5 of the EU VAT Directive.

9.7.5 VAT rate changes - planning

The last example of a practical reason why issuing SPVs should not be treated as the supply of the underlying transaction is the possible planning opportunity that this creates.

In case of changes in VAT rates, selling an SPV could provide for a planning opportunity. Making prepayments (in the sense of Article 65 of the EU VAT Directive) before a VAT rate increase becomes effective, usually does not work because under the relevant VAT rules, Member States may effect adjustments in order to take account of the rate applying at the time when the goods or services were supplied.[1126] An example of such measures is a Member State requiring payment of the additional VAT amount (i.e. the difference between the VAT amount already paid upon receipt of the prepayment and the VAT amount due at the time of the actual supply) in the first VAT return of the taxable period in which the VAT rate increase has become effective. This adjustment system cannot be applied where a business would sell an SPV (from 1 January 2019) instead of charging a prepayment, because the transfer of an SPV shall be regarded as a supply of the goods or services to which the voucher relates.[1127] This means that the actual supply is deemed to have taken place before the VAT increase. In my view, the EU VAT Directive should have been adjusted to avoid this unwanted side-effect, or rather, the transfer of an SPV should not be treated as the supply of the goods or services to which the voucher relates.

Based on the above, I come to the conclusion that issuing or supplying a voucher in itself is not the object or purpose of a transaction and that, under appropriate law, the issue or transfer of a voucher as such should not be subject to VAT.

1126 See Article 95 of the EU VAT Directive.
1127 See Article 30b(1) of the EU VAT Directive.

9.8 Can transactions regarding vouchers be VAT exempt?

In this Section I explain, after a brief introduction, why, in my view, transactions regarding vouchers are not VAT exempt, and therefore subject to VAT at the general rate, unless the transaction is outside the scope of VAT.[1128] In this Section, when I say 'transactions regarding vouchers' I mean transactions that are actually aimed at issuing, distributing and other services related to the actual vouchers and not regarding the 'underlying transactions'. 'Transactions regarding vouchers' also excludes services performed by parties involved in a voucher chain but aimed at a specific financial transaction such as transferring money from a voucher to the account of a supplier.

9.8.1 The difference between vouchers and money and payment vehicles

In my view, vouchers are not (a form of) money, securities for money, credit cards, debit cards or charge cards or any other payment vehicle. Vouchers are never the 'purpose' of a supply. Vouchers are either a step between a payment and the supply for that payment (in case the supplier of the underlying goods or services is compensated for accepting vouchers) or they give right to goods or services or a discount on the supply of goods or services. Vouchers are always linked to an underlying supply – they are proof of the entitlement to the underlying transaction or discount for the holder of the voucher, and their value is determined entirely by the value of the underlying transaction. The possibility to use vouchers is limited to participating businesses, because voucher schemes are based on legal agreements. Even though vouchers can be used for money laundering because a monetary value can be 'stored' on vouchers,[1129] they are not money or a payment vehicle.

Money and other payment vehicles, on the other hand, are not linked to specific underlying transactions. Money has its own intrinsic value. Money is legal tender, which is used as the standard form of payment for all transactions. Unlike vouchers, businesses do not enter into specific legal agreements with other businesses/entities/government bodies about whether they accept money, in the sense of their local legal currency, as payment for their supplies. Money is generally accepted as consideration. The value of money is expressed in a national currency, which may (temporarily) restrict the use of money to the jurisdiction(s) that use that currency, but by exchanging money from one currency to another the spending possibilities of money are virtually boundless.

Payment vehicles, such as credit cards, debit cards and cheques, represent money or facilitate the transfer of money. They are 'connected to' or 'aimed at' the money itself, not to the supply of goods or services that the money pays for. Even though money is, in essence, also an 'in between step' between transactions, money has completely

1128 I argued the same, using the same reasoning and foundations of my arguments, in J.B.O. Bijl, Vouchertransacties vrijgesteld van BTW?, WFR 2013/489.

1129 See, for example, a memo from the US Department of Justice's National Drug Intelligence Center, Product No. 2006-R0803-001, Prepaid Stored Value Cards: A Potential Alternative to Traditional Money Laundering Methods, 31 October 2006, accessible on-line on http://www.justice.gov/archive/ndic/pubs11/20777/20777p.pdf (last accessed on 15 March 2019).

different purposes than vouchers. The use of money is not based on a business agreement. Money is not used as a promotional scheme, or at least not in the same sense as vouchers are. Credit cards, for example, are based on a completely different business model and have a different function from vouchers: for credit card companies, granting credit for purchases and facilitating payments for the underlying transactions are their main services, for which they receive consideration (e.g. interest or a payment per transaction).

In its note to the original proposal, the Council of the European Union gives as an example of an instrument that could be a voucher or a payment method a payment method for a nominated place, e.g. a shopping centre, where the instrument sold utilises an existing payment service provider such as MasterCard or Visa and uses existing platforms to allow customers to redeem the instrument.[1130] In my view, this could be a payment instrument if the main purpose of the business operating it is granting credit for consideration (i.e. interest) and/or facilitating payment for consideration, because then the instrument is similar to a credit card. If, on the other hand, the main purpose of the scheme is to facilitate sales and increase revenue at the 'certain location', e.g. for vendors in a sports stadium, and the business operating the scheme, e.g. Visa, would agree to issue card granting a specific amount of credit that can only be spent on the goods and services provided in that location, then the service by Visa may either have to be split into two (or more) components, one of which is the exempt granting of credit for which the interest is the consideration, and the other being business promotion on behalf of the businesses at the specific location, provided that the businesses (agree to) pay Visa a specific consideration for these activities. If the activities cannot be split, e.g. because they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT.[1131] If it is not possible to regard the elements of which that service consists as constituting a principal service on the one hand and an ancillary service on the other, because those elements must be placed on the same footing, then the exemption cannot apply.[1132]

Normally, the purpose of a transaction should not be considered relevant for determining the VAT consequences of that transaction.[1133] However, what I mean by this is that voucher transactions are not transactions that are typically performed by businesses that operate in the financial sector, but rather by businesses from the retail and consumer products sectors, that operate voucher schemes as a promotional activity. This means that the nature of voucher schemes is performing promotional activities, where the vouchers are a means of enabling these businesses to run such schemes. Voucher transactions are not specific to, and essential for, the exempt transactions as included in Article 135 of the EU VAT Directive.[1134]

1130 Presidency Note to the Working Party on Tax Questions - Indirect Taxation (VAT) on the Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, 2012/0102(CNS) No. 7769/13, p. 8.

1131 CJEU case C-41/04, Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën, ECLI:EU:C:2005:292.

1132 CJEU case C-44/11, Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG, ECLI:EU:C:2012:484, paragraphs 41-43.

1133 See, for example C-4/94, BLP Group plc v Commissioners of Customs & Excise, ECLI:EU:C:1995:107.

1134 See, for example, CJEU case C-2/95, Sparekassernes Datacenter (SDC) v Skatteministeriet, ECLI:EU:C:1997:278.

9.8.2 CJEU case law about vouchers and a VAT exemption

In the second half of 2012, two national courts in different EU Member States referred questions concerning the applicability of a 'financial VAT exemption' to transactions regarding vouchers to the CJEU for a preliminary ruling.

The first question was referred by a Luxembourg court, which asked for it to be removed from the CJEU's register only three months after making the referral.[1135] The case concerned a company that is involved in transactions concerning (luncheon) vouchers by selling them to companies without own cafeterias to provide to their staff, who can use the vouchers to pay for luncheons in restaurants. The company involved reimburses these restaurants for the vouchers they accept and charges a commission for that. The following question was referred to the CJEU: "Are services carried out by an organisation issuing luncheon vouchers (…) for a restaurateur who is a member of its acceptance network exempt, either in full or in part, from VAT pursuant to Article 13B(d)(3) of the Sixth Council Directive (…), if a luncheon voucher is not a fully-fledged financial security and those services are not intended to guarantee payment for a meal purchased by an employee of the business customer (ibid. Article 13B(d)(2)), in the case of luncheon vouchers allocated by an employer to its employees (…), given that membership of a luncheon vouchers network allows a member to profit from the custom of employees of the business customers of the luncheon voucher operator and that that operator is paying the processing costs for those luncheon vouchers?".[1136] In this case, the business that issues the voucher is not the one that holds the obligation to accept it in return for its supplies.

A Dutch court referred the second question.[1137] This case concerns a company that sells vouchers to people who can use these vouchers for different purposes. They can, for example, use them to get a better deal (two for the price of one, four for the price of two) or "to not have to pay the full price for certain goods or services". Even though this company has contracts with the businesses accepting these vouchers, no payments are ever made by the company to these businesses or vice versa. The business keeps all the money it makes from the sales of the vouchers. For the businesses that accept the vouchers, this is a form of business promotion to increase their turnover. The Dutch court referred the following questions to the CJEU:

"1. Should the expression 'other securities' in Article 135(1)(f) of the EU VAT Directive be interpreted as covering a Granton card, being a transferable card which is used for the (partial) payment for goods and services, and if so, is the issuing and sale of such a card therefore exempt from the levying of turnover tax?
2. If not, should the expression 'other negotiable instruments' in Article 135(1)(d) of the EU VAT Directive be interpreted as covering a Granton card, being a transferable card which is used for the (partial) payment for goods and services, and if so, is the issuing and sale of such a card therefore exempt from the levying of turnover tax?

1135 Reference for a preliminary ruling from the Cour d'appel (Luxembourg) lodged on 25 July 2012 and removed from the CJEU's register on 9 November 2012 as requested by the Cour d'appel in a letter dated 25 October 2012.
1136 CJEU case C-395/12, État du Grand-duché de Luxembourg, Administration de l'enregistrement et des domains v. Edenred Luxembourg SA.
1137 Reference for a preliminary ruling from the Gerechtshof 's-Hertogenbosch (Netherlands), referred on 11 October 2012.

3. If a Granton card is an 'other security' or 'other negotiable instrument' in the aforementioned sense, is it important for the question of whether the issuing and sale thereof is exempt from the levying of turnover tax that, when that card is used, a levy on (a proportionate part of) the fee paid for it is, for all practical purposes, illusory?".[1138] As in the previous case, the issuer of the voucher in this case is not the one that holds the obligation to accept it in return for its supplies.

The CJEU ruled that the sale of a discount card, such as that at issue in the main proceedings, does not constitute a transaction in 'other securities' or concerning 'other negotiable instruments', within the meaning, respectively, of paragraphs 5 and 3 of Article 135 of the EU VAT Directive. This means that Member States must not apply the exemption provided for in that provision to the transactions involving these vouchers.[1139]

9.8.3 What possible exemptions could apply?

In the two cases that were referred to the CJEU, specific reference was made to the following exemptions (I have put the parts of these provisions that are not applicable between brackets and put the relevant parts in italics):

- Transactions, including negotiation, concerning deposits (and current accounts), payments, transfers, (debts,) cheques and other negotiable instruments, but excluding debt collection
  (Article 135(1)(d) of the EU VAT Directive),
- Transactions, including negotiation (but not management or safekeeping), in (shares, interests in companies or associations, debentures and) other securities (, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2))
  (Article 135(1)(f) of the EU VAT Directive).

9.8.4 Exemption in the Proposal

In December 2006, Directorate General for Taxation and the Customs Union of the European Commission undertook a public consultation to assist with the formulation of a proposal on the VAT treatment of vouchers.[1140] In the Introduction, it is stated that "vouchers continue to evolve in their scope, in some cases taking a role indistinguishable from a general payment vehicle". The majority of the responses defined certain types of vouchers as means of payment or a "money exchange for a substitute for money", i.e. as a financial service.[1141] In the Impact Assessment accompanying the Proposal, only transactions regarding certain prepaid telephone

1138 CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

1139 CJEU case C-461/12, Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag, ECLI:EU:C:2014:1745.

1140 European Commission, Consultation Paper on modernising the Value Added Tax treatment of vouchers and related issues, published on the website of the European Commission in December 2006 (http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/consultation_paper_vouchers_en.pdf).

1141 European Commission, Working Party No 1, Harmonisation of turnover taxes, Summary of results, Public consultation on 'Modernising the Value Added Tax treatment of Vouchers and related issues', TAXUD/2131/07 rev 1 – EN, p. 8.

cards are identified as possibly qualifying as financial services.[1142] In the Proposal itself a distinction is made between vouchers and payment instruments (i.e. means of payment). According to the Commission, it is necessary to look closely at the essential nature of the operation of a method of payment. Vouchers should always lead to the supply of goods or services and are often issued to promote the sales of a particular supplier or group of suppliers or to facilitate purchases. These characteristics, when combined with the entitlement to receive goods or services (corresponding to an obligation to supply these goods or services) play a role in distinguishing vouchers from mere general payment instruments (that do not contain such specific elements). According to the Commission, the distinction between a voucher and a payment service hinges on the existence of a right to receive goods or services.[1143]

I agree with the result of the Commission's view, but not with their reasoning. The Commission comes to its conclusion on the basis of a narrow definition of voucher. Because I am of the view that the term voucher encompasses many more types of transaction than the ones defined by the Commission (and that, therefore, a definition of voucher is not useful), in my view, not all vouchers 'lead to the supply of goods or services'. Some vouchers embody services. Be that as it may, transactions regarding vouchers are, in my view, not VAT exempt.

9.8.5 Are the exemptions that could apply, applicable?

Below I will discuss the arguments for and against the application of a VAT exemption, which lead me to the conclusion that no VAT exemption applies.

9.8.5.1 Arguments in favour of the application of a VAT exemption

Many consider vouchers to be a substitute for money,[1144,1145] albeit only for the parties to the agreement with the issuer of the vouchers.

The principle of neutrality, in the sense that similar transactions should be treated the same for VAT purposes, dictates that transactions regarding 'payment vouchers' should also be considered VAT exempt. In a recent case where a Member State applied a different VAT treatment to similar gambling services,[1146] the CJEU ruled that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of value added tax of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an

1142 Commission Staff working document, Impact Assessment accompanying the Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, SWD(2012) 127 final, section 2.5 (pages 21 and 22).

1143 See the Original Voucher Proposal.

1144 See, for example, CJEU case C-288/94, Argos Distributors Limited and Commissioners of Customs and Excise, ECLI:EU:C:1996:398, paragraph 19 ("… instead of money …"), CJEU case C-398/99, Yorkshire Co-operatives Ltd and Commissioners of Customs & Excise, ECLI:EU:C:2003:20, paragraphs 16 and 18 ("…to settle the sales price … by means of a … coupon …") and CJEU case C-270/09, MacDonald Resorts Ltd v The Commissioners for Her Majesty's Revenue & Customs, ECLI:EU:C:2010:780, paragraph 21 ("… while constituting in a way the means of payment that customers use …").

1145 See O. Henkow, Financial Activities in European VAT, (Alphen aan den Rijn, Kluwer Law International, 2008), 211.

1146 CJEU Joined cases C-259/10 and C-260/10, Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc, ECLI:EU:C:2011:719.

infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established. In order to assess whether, in the light of the principle of fiscal neutrality, two types of services are similar and require the same VAT treatment it must be established whether the use of those types of services is comparable from the point of view of the average consumer and meets the same needs of that consumer.[1147]

Support for the view that transactions regarding some vouchers are similar to VAT exempt payment services can be found in CJEU case law and from comments on this topic from various parties involved in these types of transactions. For example, the CJEU has pointed out that services provided by a credit card company don't only consist of guaranteeing payment for the goods purchased by means of the card, but also the promotion of the supplier's business by enabling him to acquire new customers, possible publicity on his behalf or the like.[1148] This means that 'means of payment' can also have more than just a financial component. Besides that, it can also be argued that credit cards can also only be used to pay for transactions within a limited network of suppliers,[1149] because not all businesses accept payment by credit card and if they do, they do not always accept all credit cards. However, transactions concerning credit cards are exempt.

Also, various businesses that are involved in transactions regarding vouchers and that responded to the European Commission's Consultation Paper on modernising the VAT treatment of vouchers and related issues, support treating transactions regarding 'payment vouchers' the same as payment services. The only two parties representing financial services providers that submitted their view on this matter are of the view that (certain) vouchers should qualify as means of payment,[1150] and so does the only body representing accounting organisations that submitted its view.[1151]

1147 More examples of CJEU case law on fiscal neutrality requiring transactions similar to VAT exempt transactions to also be treated as VAT exempt, unless the transaction is absolutely prohibited, are: CJEU case C-343/89, Max Witzemann v Hauptzollamt München-Mitte, ECLI:EU:C:1990:445, CJEU case C-381/95, Karlheinz Fischer v Finanzamt Donaueschingen, ECLI:EU:C:1998:276and CJEU case C-381/09, Gennaro Curia v Ministero dell'Economia e delle Finanze et Agenzia delle Entrate, ECLI:EU:C:2010:406.

1148 CJEU case C-18/92, Chaussures Bally SA and Belgian State, ECLI:EU:C:1993:212, paragraph 9.

1149 Services based on instruments that can be used to acquire goods or services only under a commercial agreement with the issuer within a limited network of suppliers are excluded from the application of the Directive on payment services within the internal market, Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319, 5.12.2007, p. 1–36, Article 3(k).

1150 European Banking Federation's response to the European Commission's Consultation Paper on modernising the VAT treatment of vouchers and related issues, 31 January 2007 ("The payments rather than the MPV should be at the centre of the debate") and British Bankers' Association Response to European Commission Consultation Paper on Modernising the Value Added Tax Treatment of Vouchers and Related Issues", 26 January 2007 ("There is therefore a very fine line between what can be construed as actual legal tender and what essentially 'equates' to being legal tender").

1151 Memorandum submitted in March 2007 by the Tax Faculty of the Chartered Institute of Chartered Accountants in England and Wales to the European Commission in response to an invitation to comment in a consultation paper published on 13 November 2006 ("All other vouchers (i.e. all vouchers except 'Single-purpose Vouchers', JB) for which consideration has been given should be treated as means of payment (…)").

9.8.5.2 Arguments against the application of a VAT exemption

In the EU Directive on Payment Services, paper based vouchers and services based on instruments that can be used to acquire goods or services only in the premises used by the issuer or under a commercial agreement with the issuer either within a limited network of service providers or for a limited range of goods or services, are explicitly excluded from the application of that Directive.[1152] It is clear from this that the European Commission does not consider services based on vouchers to be 'payment services'. The Commission does not qualify vouchers as 'electronic money' either. The EU Directive on the taking up, pursuit and prudential supervision of the business of electronic money institutions[1153] does not apply to monetary value stored on specific pre-paid instruments, designed to address precise needs that can be used only in a limited way, because they allow the electronic money holder to purchase goods or services only in the premises of the electronic money issuer or within a limited network of service providers under direct commercial agreement with a professional issuer, or because they can be used only to acquire a limited range of goods or services. An instrument should be considered to be used within such a limited network if it can be used only either for the purchase of goods and services in a specific store or chain of stores, or for a limited range of goods or services, regardless of the geographical location of the point of sale. Such instruments could include store cards, petrol cards, membership cards, public transport cards, meal vouchers or vouchers for services (such as vouchers for childcare, or vouchers for social or services schemes which subsidise the employment of staff to carry out household tasks such as cleaning, ironing or gardening), which are sometimes subject to a specific tax or labour legal framework designed to promote the use of such instruments to meet the objectives laid down in social legislation. Where such a specific-purpose instrument develops into a general-purpose instrument, the exemption from the scope of this Directive should no longer apply. Instruments which can be used for purchases in stores of listed merchants should not be exempted from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.

This means that voucher transactions are not considered payment services nor services concerning electronic money, which are typically VAT exempt. This could, however, be different for certain types of instruments that can be used to store monetary value that can be spent without limits that are based on business or product/services promotion schemes. I will elaborate on this below.

In a proposal for a Regulation regarding the treatment of insurance and financial services, the Commission considers services that grant the right or the option of receiving goods or services not to have the specific and essential character of an

1152 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319, 5.12.2007, p. 1–36, Articles 3(g)(v) and 3(k).

1153 5th Preamble to Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (Text with EEA relevance), OJ L 267, 10.10.2009, p. 7–17.

exempt service.[1154] Issuing or distributing vouchers that embody rights is, in my view, not VAT exempt because these activities can be qualified as 'promotional activities', 'the supply of the right to preferential treatment', 'distribution services' or 'sales support'[1155] but not as a VAT exempt financial activity.

Also, the CJEU has not explicitly ruled or mentioned that an exemption applies to transactions regarding vouchers in any of the cases referred to it for a preliminary ruling, even though various cases dealt with the VAT treatment of vouchers.[1156] And it is established case-law that the terms used to specify the exemptions referred to in Article 135(1) of the EU VAT Directive are to be interpreted strictly.[1157]

At first sight, vouchers that are issued by businesses that do not accept them in return for the supply of goods or services, but that reimburse the businesses that have agreed to accept the vouchers closely resemble 'cheques' or other means of payment. Examples of this type of voucher are film vouchers, book tokens and luncheon vouchers. Some countries, such as the Netherlands, used to treat transactions concerning these vouchers as VAT exempt.[1158] Be that as it may, in my view, the main purpose of issuing these vouchers is either to promote certain lines of business (e.g. cinemas, book shops or participating restaurants) or to provide (often tax friendly) employee benefits, expense management or loyalty schemes.[1159] Even though they are 'as good as money', they can only be 'spent' at participating businesses. They cannot be compared to credit cards, because no credit is granted by the businesses issuing the vouchers. In my view, they are not 'cheques' as referred to in Article 135(1)(d) of the EU VAT Directive either, because, as I explained, it is not the provision of a financial service that is the main purpose of the issuers of the voucher. According to the CJEU, all transactions set out in subparagraphs b to g are, by their nature, financial transactions.[1160] The CJEU has also made clear that if a single, composite service consists of different elements, where the exempt part of the transaction is not the main element that is made more attractive by one or more ancillary elements, but where the different (exempt and non-exempt) elements are considered to be so closely linked that they form, objectively, a single economic

1154 See Article 13(1)(2)(k) of the Proposal for a Council Regulation laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services (COM/2007/746).

1155 A-G Fennelly, in his opinion in case C-288/94, Argos Distributors Limited and Commissioners of Customs and Excise, ECLI:EU:C:1996:253, suggests that the 'margin' between purchase price and sales price for a distributor is consideration for sales promotion, cash flow benefits and benefits of breakage (point 36).

1156 See, for example, CJEU cases C-126/88, Boots Company plc and The Commissioners of Customs and Excise ECLI:EU:C:1990:136, C-40/09, Astra Zeneca UK Ltd c Commissioners for Her Majesty's Revenue and Customs, ECLI:EU:C:2010:450 and joined cases C-53/09 and C-55/09, Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd (C-53/09) and Baxi Group Ltd (C-55/09), ECLI:EU:C:2010:590.

1157 See, inter alia, CJEU cases C-8/01 Assurandør-Societetet, acting on behalf of Taksatorringen and Skatteministeriet, ECLI:EU:C:2003:621, paragraph 36, C-259/11, DTZ Zadelhoff vof v Staatssecretaris van Financiën, ECLI:EU:C:2012:423, paragraph 20 and C-44/11, Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG, ECLI:EU:C:2012:484, paragraph 36.

1158 Decree on the VAT treatment of gift cards of 30 December 1999, Reference No. VB1999/2649, repealed from 1 January 2019.

1159 See the website of Edenred, the company that is the taxpayer in the Luxembour referral: http://www.edenred.com/en/Solutions/incentive-rewards/Pages/default.aspx.

1160 CJEU case C-455/05, Velvet & Steel Immobilien und Handels GmbH v Finanzamt Hamburt-Eimsbüttel, ECLI:EU:C:2007:232, paragraphs 21 and 22.

supply which it would be artificial to split and where the elements must be placed on the same footing, the transaction as a whole cannot be considered exempt.[1161] Therefore, transactions concerning vouchers are not VAT exempt.[1162]

Lastly, the term 'deposits' as referred to in Article 135(1) of the EU VAT Directive does not, in my view, refer to deposits that are paid as security for a transaction, but to transactions regarding deposit accounts.[1163] The term 'deposit' as a security by the CJEU is different from the term 'deposit' in Article 135(1) in other languages than English.[1164] The exemption for transactions concerning deposits can therefore, in my view, not be applied to transactions concerning vouchers.

9.8.6 E-money and m-payments

As mentioned above, in the E-money directive[1165] only prepaid instruments that are designed to address precise needs that can be used only in a limited way are excluded from the application of that directive. This means that prepaid instruments that can be used for an unlimited amount of transactions,[1166] which includes instruments that can be used to pay supplies by listed businesses as such instruments are typically designed for a network of suppliers that is continuously growing,[1167] qualify as e-money. Certain services regarding e-money are covered by VAT exemptions, such as the exemption regarding transactions, including negotiation, concerning deposits (and current accounts), payments, transfers, (debts,) cheques and other negotiable instruments, but excluding debt collection.[1168]

The same exemptions may apply to some services regarding m-payments. M-payments are payments for which the data and payment instructions are initiated,

1161 CJEU case C-44/11, Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG, ECLI:EU:C:2012:484.

1162 For a different view on the application of the exemption to services performed by 'clearing houses', i.e. issuers of vouchers that reimburse other businesses for accepting these vouchers in return for their supplies, see Mariken E. van Hilten, Bancaire en financiële prestaties in de Europese btw (Banking and financial transactions in European VAT, JB) (Deventer, Kluwer, 1992), 108-109.

1163 See, for example, See A New Tax System (Goods and Services Tax) Act 1999, Act No. 55 of 1999 as amended (the Australian GST Act, JB), Division 195 (Dictionary), and Cambridge Dictionaries Online, Definition of deposit account (noun) from the Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press, accessed on 13 February 2013 at http://dictionary.cambridge.org/dictionary/british/ ("a bank account in which you usually leave money for a long time and which pays you interest").

1164 The term 'deposit' as used by the CJEU in case C-277/05, Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie, ECLI:EU:C:2007:440, paragraph 30, is 'voorschot' in Dutch, 'Angeld' in German and 'arrhes' in French (the original language of the case), whereas the term 'deposit' in Article 135(1) is 'deposito's' in Dutch, 'Einlagengeschäft' in German and 'dépôts de fonds' in French.

1165 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (Text with EEA relevance), OJ L 267, 10.10.2009, p. 7–17.

1166 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (Text with EEA relevance), OJ L 267, 10.10.2009, p. 7–17.

1167 5th Preamble to Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (Text with EEA relevance), OJ L 267, 10.10.2009, p. 7–17.

1168 Article 135(1)(d) of the EU VAT Directive.

transmitted or confirmed via a mobile phone or device.[1169] Prepaid phone cards can be used for these payments, even though most m-payments are currently based on (credit) card payment schemes and other solutions, such as payments using prepaid credit, seem to have difficulties entering the market.[1170] According to the European Commission, some definitions regarding m-payments suggest that the line between e-payments and m-payments is blurred, and may become even more so in the future.[1171]

The above suggests that where credit/money stored on an instrument or online can be used as payment for a (virtually) unlimited amount of supplies by a (virtually) unlimited amount of businesses, some transactions regarding these instruments, such as vouchers, are VAT exempt. The terms used to describe the exemptions are to be interpreted strictly since these constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person.[1172] In order to be characterized as VAT exempt transactions, the services must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in the relevant provisions concerning the VAT exempt transactions. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation.[1173] This means that some specific services provided with regard to the transfer of money stored on vouchers (or online) can be VAT exempt.

The distribution of vouchers is, in my view, not covered by any of the exemptions. Even the distribution of a prepaid phone card is not a service that, in my view, qualifies as a VAT exempt financial transaction but rather as a ‘distribution service’ or a ‘marketing service’ as I explained earlier. Service more or less linked to VAT exempt transactions, such as the transport of funds, and similar examples which might be added, show the need to keep the exemption within the confines of what constitutes its legal object: the financial operations and transaction.[1174]

9.8.7 Conclusion regarding the applicability of a VAT exemption

In my view, taking all the above into account, the arguments against the application of an exemption to voucher transactions are much stronger than the arguments for an exemption. Therefore, transactions regarding ‘payment vouchers’ should in my view be subject to VAT, unless they’re outside the scope of VAT. However, this can be different for certain specific services aimed at specific parts of a transaction, i.e. the

1169 See the European Commission’s Green Paper: Towards an integrated European market for card, internet and mobile payments, COM(2011)941 final, 11 January 2012, p. 5.
1170 See the European Commission’s Green Paper: Towards an integrated European market for card, internet and mobile payments, COM(2011)941 final, 11 January 2012, p. 5.
1171 See the European Commission’s Green Paper: Towards an integrated European market for card, internet and mobile payments, COM(2011)941 final, 11 January 2012, p. 5.
1172 See CJEU case C-2/95, Sparekassernes Datacenter (SDC) v Skatteministeriet, ECLI:EU:C:1997:278, paragraph 20.
1173 See CJEU case C-2/95, Sparekassernes Datacenter (SDC) v Skatteministeriet, ECLI:EU:C:1997:278, paragraph 66.
1174 See CJEU case C-2/95, Sparekassernes Datacenter (SDC) v Skatteministeriet, ECLI:EU:C:1997:278, paragraphs 62 and 63.

transfer of funds as payment for a supply. As a main rule, distribution services regarding vouchers are not exempt.

9.9 Example case: the VAT treatment of a voucher (or: points) based loyalty scheme operated by a 'loyalty business' (e.g. Nectar points or Air Miles).

I will now apply the above principles to a complex example, based on an existing loyalty management scheme, example of which are 'Nectar Points'[1175] in the UK and 'Air Miles'[1176] in the Netherlands. The loyalty scheme is operated by a business that offers the loyalty (management) scheme to other businesses, usually to only one business per sector (e.g. one retailer, one petrol station chain, one financial services provider etc.). The organiser of the scheme keeps accounts for customers, who will receive a certain amount of 'points' when spending a defined amount of money when purchasing goods or services from the associated businesses. These businesses will pay the organiser of the scheme an agreed amount per point issued, because they believe that customers will be persuaded to purchase (more of) their goods or services because they will receive these coveted 'points'. Points can be used by the customers to purchase goods or services from (other or the same) associated businesses, either by only paying with the points or by partially using the points and paying the remaining amount in a different way. The organiser will pay the businesses that accept these 'points' an agreed amount per point, which is lower than the amount received for issuing the points. Businesses accept these points for the same reason they pay for issuing them: they believe that (potential) customers will be persuaded to purchase (more of) their goods or services because they can 'save points for free goods or services or goods or services at a discount'.

On 13 March 2013, the Supreme Court of the United Kingdom gave judgment on (some of) the VAT issues surrounding this scheme.[1177] I will start with a factual description of the (complex) scheme, based on this case, which I will reproduce in components of a schedule, which I will include as a whole at the end.

A member of the scheme (Customer) has an account with Issuer, who issued a Card to Customer for collecting and redeeming "points". When a member purchases goods or services from retailer (Supplier 1) that has agreed with Issuer to participate in the scheme in relation to the issue of "points", Supplier 1 swipes the Card and Customer's account with Issuer is electronically credited with a number of points.

In the examples below, the applicable VAT rate is 25%. The customer is a business that can fully deduct VAT. Thin arrows represent cash, white arrows represent vouchers, grey arrows represent loyalty programme related services and black arrows represent supplies made by the participating businesses.

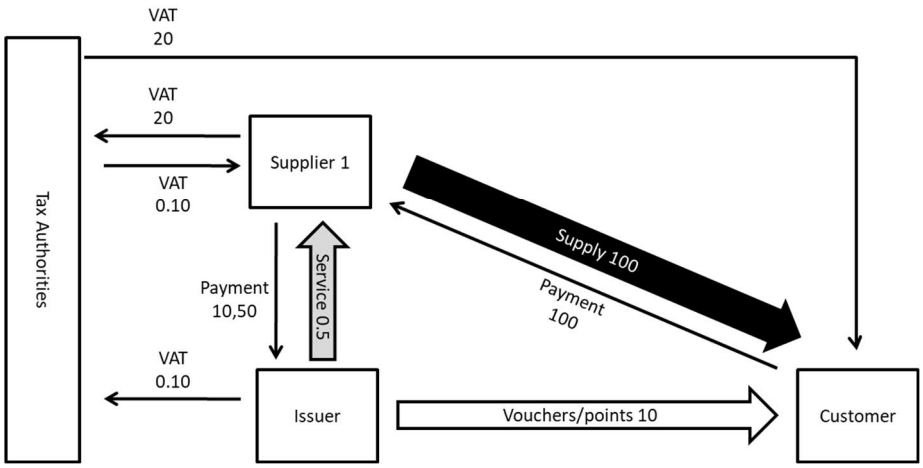
1175 See www.about.sainsburys.co.uk/great-products-and-services/nectar (last visited on 13 March2019).

1176 See www.airmiles.nl (last visited on 13 March 2019)

1177 UK Supreme Court, 13 March 2013, Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited [2013] UKSC 15.

In the example below in Diagram 1, Customer purchases items with a (VAT inclusive) value of Euro 100 at Supplier 1, for which he is rewarded 10 points on his Card account. Supplier 1 will have funded (or will fund) these points by paying 10 for these points to Issuer. Issuer will charge a service fee of 10.5 to Supplier 1, in which the price of the points is included. Effectively, Supplier 1 pays 0.5 for a service that is provided to him by Issuer as well as 10 for the points awarded by Issuer to Customer. Supplier 1 has to remit 20 VAT to the Tax Authorities for his supply to Customer and he can deduct 0.1, i.e. the VAT on the service provided to him by Issuer. Customer can deduct the VAT on his purchase (i.e. 20) from the Tax Authorities in this example.

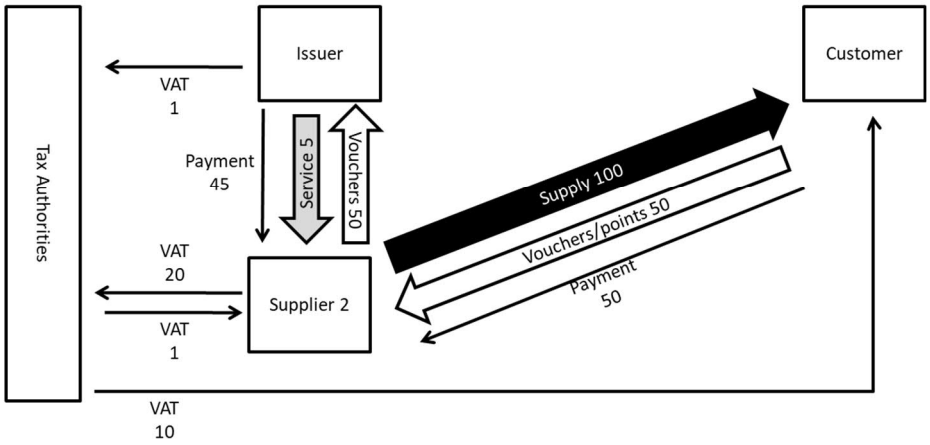
Diagram 1



In Diagram 2, Customer is then entitled to use the 50 points to receive goods or services with a value of 100, at a reduced cost (i.e. for an additional payment of 50), from a retailer (Supplier 2) that has agreed with Issuer to participate in the scheme in relation to the "redemption" of points. When Customer receives goods or services from Supplier 2, this retailer swipes the Card and Customer's account with Issuer is electronically debited with the number of points which have been redeemed. Issuer will reimburse Supplier 2 for the supply made to Customer in return for the points by paying 50, and he will provide a service (for consideration, to the amount of 5) to Supplier 2 as well. These amounts will be settled.

For the supply of goods, for which he receives 50 from Customer and 50 from Issuer, Supplier 2 will have to remit 20 VAT to the Tax Authorities. Issuer will have to remit 1 VAT to the Tax Authorities for his services to Supplier 2, and Supplier 2 can deduct this VAT. Customer can deduct 10 VAT on his purchase.

Diagram 2



The scheme involves three (or four) parties:
(1) the promoter of the scheme, Issuer;
(2) the members of the scheme ("Customer");
(3) retailers of goods and services ("Supplier 1"), who pay for their customers, if they produce a Card, to have points credited to their accounts with Issuer when they have purchased goods or services and their cards are swiped; and
(4) other retailers of goods and services ("Supplier 2"), from whom Customer receives goods and services, at no cost or at a reduced cost, when his Card is swiped and points are debited to their accounts.
The last two parties can be one category if all businesses that fund points upon purchase of their goods and services also accept these points in return for their goods and services.

The scheme depends upon a network of contracts between Issuer and these three parties:

First, Issuer agrees with Customer the terms upon which his account is operated, including an obligation on the part of Issuer that it will ensure that Customer can obtain points when he purchases goods or services from participating retailers (e.g. Supplier 1), and that it will ensure that goods and services are made available to Customer at no cost, or at a reduced cost, when he redeems his points at participating retailers (e.g. Supplier 2). Issuer provides Customer with information about the identities of the participating retailers (e.g. Supplier 1 and Supplier 2), the particular goods and services which can be obtained using the points, and the number of points required in order to receive the goods or services in question.

Secondly, Issuer agrees with participating retailers (e.g. Supplier 1) that they will ensure crediting Customer's account with the points for which the retailers have agreed to pay (i.e. that they will 'fund') and that Issuer will ensure that goods and services are made available to Customer upon redemption of these points (this is what would make shopping at these retailers more attractive: they issue (fund) points). In

return, the retailers make payments to Issuer based on the number of points credited to Customer's account, at an agreed value per point, together with a(n annual) marketing fee. Issuer grants these retailers the exclusive right to participate in the scheme in a particular market sector. The contract entered into between Issuer and these retailers provides that their agreement does not create a relationship of partnership or agency.

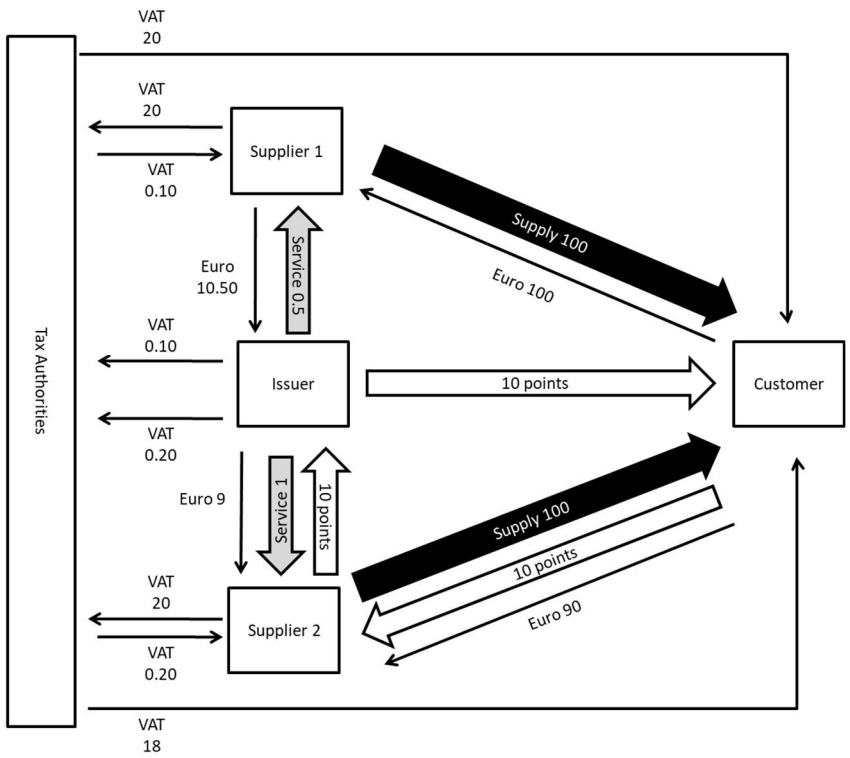
As a third point, Issuer agrees with other (or the same) retailers (e.g. Supplier 2) that they will provide Customer with specified goods and services upon the redemption of the applicable number of points, and that Issuer will reimburse the redeemed points based on the number of points redeemed, at an agreed value per point. (That value may be lower than the value agreed with the 'funding retailers' such as Supplier 1). It can be that Supplier 2 is required to supply some services to Issuer, e.g. providing him with information about problems affecting the quality or availability of goods and services, providing specific customer data and other information which Issuer requires for marketing purposes, granting permission for the use of his name and brand in marketing material, handle complaints by Customer and replace faulty goods.

The three contracts involved in the scheme are separate from, and should not be confused with, the agreements between Supplier 1 and Customer, or the agreements between Customer and Supplier 2. In particular, the purchase of goods or services by Customer from Supplier 1 is a separate transaction, between different parties, from the crediting of points by Issuer to Customer's account, or the payment of Issuer by Supplier 2 in respect of those points.

The 'points' are a means of keeping account of Customer's contractual rights to receive goods and services at no cost or at a reduced cost. Supplier 1 pays Issuer for the grant of those rights to collectors. Issuer uses part of its receipts from Supplier 1 to pay Supplier 2 to provide Customer with the goods and services in accordance with their rights. Issuer derives its profits from the difference between its receipts from Supplier 1 and its payments to Supplier 2.

Diagram 3 shows all relevant transactions, where the applicable VAT rate is 25%, Supplier 1 'awards' his Customer 1 point for every Euro 10 spent (which is actually issued or recorded by Issuer and funded by Supplier 1), Supplier 2 accepts 1 point as payment for every cash unit of an advertised price and Issuer charges (settles) 5% of the value of the point awarded by/issued on behalf of Supplier 1, therefore charging 95/100 cash units from Supplier 1 for every point issued and 10% of the points value in cash units with Supplier 2. In order to visualise a 'closed circle' of transactions, I changed the above examples so that all points funded by Supplier 1 are actually redeemed at Supplier 2 as part payment for his supply. This means that Customer uses 10 points and Euro 90 for purchasing goods or services from Supplier 2:

Diagram 3



9.10 Summary

Under the current EU VAT rules, a distinction exists between 'vouchers' as defined in Article 30a(1) of the EU VAT Directive and transactions involving other instruments that, in practice, can also be referred to as 'vouchers' but are not covered by the EU VAT definition. The EU VAT rules distinguish two types of 'vouchers': single purpose vouchers (SPVs), where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher, and multi purpose vouchers (MPVs), meaning a voucher other than an SPV.

Each transfer of an SPV made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the SPV relates. The actual handing over of the goods or the actual provision of the services in return for an SPV accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

The actual handing over of the goods or the actual provision of the services in return for an MPV accepted as consideration or part consideration by the supplier shall be subject to VAT, whereas each preceding transfer of that MPV shall not be subject to VAT.

These rules, that came into force on 1 January 2019, were intended to harmonise the way voucher transactions are taxed within the EU. However, as I demonstrated in this Chapter, these new rules did not solve all existing issues surrounding the VAT treatment of voucher transactions, but they created some new issues as well. In this Chapter, I have described tax technical issues as well as practical issues that are the result of the application of the EU VAT treatment under the current rules.

The VAT treatment of vouchers that are not covered by the EU VAT definition of 'voucher' are determined by the other relevant (general) provisions in the EU VAT Directive as well as CJEU case law.

Because in economic and commercial reality, vouchers are not the object or aim of a transaction, under desired and appropriate law, the supply and the issuing of vouchers should not be subject to VAT (contrary to current EU VAT rules and regulations). However, these transactions should be considered economic activities entitling the supplier or issuer of the vouchers to deduct VAT on the costs relating to the supply or issuing of the vouchers, provided that the relevant requirements for deduction are met.

Vouchers embody proof that the holder of the voucher is entitled to something: a supply of goods, services or a discount to a transaction, usually because the voucher also proves that payment was already received for those future transactions. The taxable amount for the underlying transaction should be the amount actually received by the supplier of the goods or services for which the voucher is redeemed. It can be difficult to establish what this amount is if other considerations, for example for the distribution of vouchers or for being allowed to be part of a specific voucher scheme, are settled with the consideration for the supply of goods or services for which the voucher is used.

The distribution of vouchers is often not specifically agreed between parties as being a service performed for consideration. However, it should be treated as such in cases where economic reality dictates so.

Transactions regarding vouchers, not being the supply and issuing of vouchers, are not VAT exempt.

10 Summary, conclusions and recommendations

This Chapter contains a summary of this research as well as my findings and conclusions. I will also include some recommendations.

10.1 Purpose of the research and research questions

The purpose of this research is examining the VAT treatment of voucher transactions in the context of promotional activities within the framework of the EU VAT rules, CJEU case law as well as desired or appropriate law, where this deviates from positive law. As demonstrated, voucher transactions deserve a specific focus because the VAT treatment of transactions involving vouchers has proven very obstinate. Current rules and case law are in my view still not best suited to provide for the appropriate VAT treatment of these transactions. This research is aimed at answering how voucher transactions in the context of promotional activities should be treated from an EU VAT perspective.

To get to the answer of my main question, what is the appropriate VAT treatment of vouchers in the context of promotional activities, a number of sequential steps needed to be taken. These steps were intended to get answers to a number of questions that are necessary to see and understand the full 'landscape' that is covered by my main question. Vouchers are used for so many different shapes and forms of promotional activities, that the following separate elements, or questions, needed to be researched and answered:

- How to determine whether a supply is made free of charge? (discussed in Section 3)
- How to determine whether a supply that is part of a composite supply (or: an element in a composite supply) that – as a whole – is made for consideration, is made free of charge? (discussed in Section 4)
- What should be the VAT treatment of discounts or rebates granted to other persons than the actual recipient of the original transaction? (discussed in Section 5)
- Which free supplies are and should be taxed and how can this be best achieved? And what should be the taxable basis or taxable amount for free supplies? (discussed in Section 6)
- What should be the taxable amount or taxable basis for barter transactions? (discussed in Section 7)
- Can the VAT on costs incurred for performing promotional activities always be fully deducted? Should it always be deductible? (included in Sections 6 and 8)

The answers to all the above questions should lead to the answer to the main question of this research:

- How should transactions involving vouchers be treated from an EU VAT perspective? (Section 9)

In this research I have answered these questions, applying positive EU law and case law and testing this against the purpose of EU VAT, being a tax on expenditure for local private consumption, as well as the economic and commercial reality of the relevant transactions. In this last Chapter, I will answer all these questions and, where relevant, I will provide recommendations.

10.2 Summary research framework

I have used positive law as a basis for this research, in order to establish how promotional activities and, in particular, voucher transactions are treated under the existing EU VAT rules (positive law). I have used the purpose of EU VAT as well as economic and commercial reality as a referencing system for my research. I have applied this referencing system to test whether the application of positive law is in line with appropriate or desired law. For that purpose, I have tested the outcome of the application of positive law against EU VAT being a tax on expenditure for local private consumption, which includes the characteristic that VAT should be deductible throughout the production and distribution chain. I have also used economic and commercial reality as a measure for testing whether positive law is in line with appropriate law as based on the principles mentioned above.

10.3 Answers to the research questions

The answer to the main question of this research, how voucher transactions in the context of promotional activities should be treated from an EU VAT perspective, depends on the answers to multiple preliminary questions, which can be summarized as “how should promotional activities be treated from an EU VAT perspective”. This summarized question consists of a number of sub-questions that I have listed below and that I have answered in this research, applying the research framework described above.

10.3.1 How to determine whether a supply is made free of charge?

The first question is about how to determine whether a supply is made free of charge. The VAT treatment of supplies for consideration is fairly straightforward. However, the VAT treatment of supplies that are made for no consideration depends on a number of different factors.

The point is that free supplies are treated differently from supplies that are made for consideration, and therefore it is relevant to determine whether a supply is made for consideration. The question is a step in answering another question that comes next, which is how to determine whether the elements in a multiple-element supply that is made for consideration, are all supplied for consideration.

Supplies are made for consideration, and therefore not free of charge, where a direct link exists between a supply and the consideration received in return for that supply. A

direct link in that sense exists if a legal agreement exists between the supplier and the recipient of the supply as a basis for the supply as well as for the agreed reciprocal consideration. Without a direct link between a supply and a consideration, or if a supply is made without an agreed consideration, the supply is made free of charge.

10.3.2 How to determine whether a supply that is part of a composite supply (or: an element in a composite supply) that is made for consideration, is made free of charge?

It is relevant to determine whether the elements to a multiple-element supply that is made for consideration, are all considered to be made for consideration. If this is the case, the consideration will have to be apportioned to all elements. However, if this is not the case, the VAT treatment of the elements that are supplied free of charge depends on a number of different factors.

Elements in a multiple-element supply that are advertised as being supplied for free are, as a general rule, supplied free of charge. The 'legal reality' should be the basis for determining the VAT treatment of a transaction, unless economic and commercial reality deviate from this legal reality.

In the following cases, multiple-element supplies including an element that is advertised as supplied free of charge, may be treated as if all elements are supplied for consideration, depending on the economic and commercial reality of these transactions:

- Supplies here the 'free' element is included in the composite supply through absorption or amalgamation;
- Supplies where the 'free' element has an absolute and relatively high value;
- Supplies that are so-called 'combination deals';
- Supplies where the customer has to accept the 'free' supply and has no choice not to accept it; and
- Supplies where the 'free' element is an explicit part of a negotiated deal.

This means that unless any of the above situations occurs, the element to a composite supply that is advertised as 'free' is actually supplied for no consideration. This raises the question of how to treat free supplies from a VAT perspective, but before I answer that question, some different question should be answered.

10.3.3 What should be the VAT treatment of discounts or rebates granted to other persons than the actual recipient of the original transaction?

The current EU VAT rules and regulations for determining the VAT treatment of discounts or rebates granted to the actual purchasers of the goods and services supplied by the business granting these discounts or rebates are pretty straightforward, and in line with the principles underlying the EU VAT system: they

cause the taxable amount for the original supply to be lowered with the amount of the discount or rebate.

In practice, businesses stimulate the sales of their products not only by funding the purchase of these products through 'direct' discounts or rebates, but also by granting 'discounts' to purchasers further down the production and distribution chain. Usually, the final consumers are granted these discounts, also by, for example, the manufacturers of products. In practice, these discounts or rebates are usually granted through incentives called 'cash back schemes' or 'money off schemes', often involving the retailer selling these products to the final consumer.

The CJEU has decided to treat these types of discounts or rebates the same as direct discounts or rebates, lowering the taxable amount of the original supply of the product (that was not supplied to the person that is awarded the discount). I have demonstrated that this solution raises some issues that are not in line with the principles underlying the EU VAT system.

I have also proposed an alternative to this system, based on the economic and commercial reality of funding the purchase of a product by a person that is not the customer of the business funding that product. I have suggested a solution called 'joint payment – shared deduction', which would consider the product to be partially purchased by the business funding the product (insofar as it funds that purchase). This should allow the business funding that purchase to deduct the VAT on 'his part of the purchase'. Basically, such transactions would be considered 'business costs' and treated similar to, for example, advertisement costs.

Having answered questions about decreasing the purchase price of certain transactions, even to a level where there actually is no consideration, raises the next question: how should supplies that are made for no consideration treated from a VAT perspective?

10.3.4 Which free supplies are and should be taxed and how can this be best achieved?

EU VAT is a tax on a tax consumption that is levied by taxing expenditure for local private consumption. If supplies are made for no consideration and these supplies are 'consumed' (i.e. they leave the production and distribution chain and are used or applied for consumptive purposes), these supplies should also be taxed. This can be done by either disallowing deduction on the expenditure for these transactions (either at the time of purchase or retroactively) or by treating these supplies as if they were made for consideration, which means taxing them.

The EU legislator has chosen to apply the latter method of treating certain supplies that are made free of charge as if they were made for consideration. This latter method is preferable to disallowing full or partial VAT deduction at the time of the

purchase of goods or services, because that entails a certain degree of arbitrariness that does is not in line with the relevant principles underlying the EU VAT system. Retroactive adjustment of an earlier deduction as based on consumptive use or application has more or less the same effect as taxing the consumptive use or application of goods or services. Taxing these transactions has the benefit that it is easier to apply in practice because the VAT amount initially deducted does not have to be apportioned over a period of time or between business and private use.

Where the business purpose for the free supply or application of goods or services predominates the private consumption, no adjustment should be made. Under the current rules, this rationale is applied to the free supply of services but not to the free supply or application of business assets (goods). These are, as a general rule, treated as if they were made for consideration, and therefore subject to VAT, unless the relevant goods qualify as samples or as gifts of small value. In my view, predominant business reasons for the application or supply of business assets free of charge should not be subject to VAT. This is also based on the principle of neutrality, that requires transactions of a sufficiently similar nature to be treated the same from a VAT perspective.

10.3.5 What should be the taxable basis or taxable amount for free supplies?

Under the current EU VAT rules, the taxable amount for the supply of goods for no consideration is deemed to be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of the supply. This is different for the supply of services for no consideration. The taxable amount for fee services is the full cost of providing the services.

Because the taxation of consumption, or private use, should lead to a result that would put the recipient of these supplies in the same position as a regular customer, the taxable amount for the free supply of goods should be similar to the free supply of services. This would also ensure that the alternative system for ensuring taxation of private consumption, i.e. (retroactive) disallowing deduction of VAT on the cost of the supply, would lead to the same result. This would, however, require the current EU VAT rules to be changed.

10.3.6 What should be the taxable amount or taxable basis for barter transactions?

Barter transactions are two simultaneous supplies of goods or services for consideration, where the considerations for both supplies is considered to be the same amount and these amounts are settled, as a result of which no cash payments are effectively made. Under the current EU VAT rules, the method for calculating the taxable amount for these barter transactions is based on the rules for calculating the taxable amount for free supplies of goods and services. For goods, the taxable amount is deemed to be the purchase price of the goods or of similar goods or, in the absence

of a purchase price, the cost price, determined at the time of the supply. The taxable amount for services is the full cost of providing the services. As I demonstrated, applying this method for determining the taxable amount for barter transactions leads to results that are not fully in line with some of the relevant underlying principles of the EU VAT system or the economic and commercial reality of these barter transactions.

I therefore proposed an alternative method for determining the taxable amount in these situations, based on the economic and commercial reality of these transactions. First, for barter transactions between two taxable persons, these persons should be required to agree the value of their supplies. If this proves to be impossible or where non-taxable persons are involved in the barter transaction, the 'open market value' of the transactions should be used to establish the taxable amount. This would require an amendment to the existing EU VAT rules.

Where a 'payment in kind' for a supply of goods or services has no real economic value but where it is (more) a condition for qualifying for a discount or a supply, the 'payment in kind' is not a consideration and the transaction is not a barter transaction.

10.3.7 Can the VAT on costs incurred for performing promotional activities always be fully deducted? Should it always be deductible?

The VAT deduction system is meant to relieve businesses entirely of the burden of the VAT payable or paid in the course of all their economic activities. Based on consistent CJEU case law, the EU VAT system consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT.

To give rise to the right to deduct VAT, the goods or services acquired must have a direct and immediate link with the output transactions which give rise to the right to deduct. In principle, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary before a taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement

I did not include a separate Chapter on VAT deduction. VAT deduction was included in all Chapters where it was a relevant issue. In my view, VAT on costs incurred for performing promotional activities can and should always be fully deducted, unless the costs are related to VAT exempt activities.

This means that VAT deduction should not be affected by the fact that supplies are made free of charge. Where no VAT is charged on the supply of free goods or services, VAT deduction is still ensured under the relevant EU VAT rules. This also means that

VAT deduction should not be affected by the answer to the question whether certain elements to a multiple-element supply are made free of charge.

Under the current EU VAT rules, the costs of goods and services acquired by the organiser of a free lottery do not have a direct and immediate link with the free lottery activities. This means that the VAT incurred on the costs of these goods and services can be deducted as VAT on 'general costs' or 'overhead costs', following the general VAT deduction right of the business.

As a general rule, promotional activities are business activities, and the VAT on the cost of performing promotional activities should be deductible. As a main rule, this is the case under the current EU VAT rules and case law and in my view, this is in line with the relevant underlying principles of VAT and the economic and commercial reality of performing promotional activities.

10.3.8 How should transactions involving vouchers, in the context of promotional activities, be treated from an EU VAT perspective?

The central question of this research is how voucher transactions that are performed in the context of promotional activities, should be treated from an EU VAT perspective. Promotional activities performed for business by third parties, where the business is basically the recipient of these promotional activities, are outside the scope of this research because these activities are not performed using vouchers issued by the business itself. Also, the focus of this research is centred around the dissonance between business having to tax output that leads to consumption, under the purpose of EU VAT which is to tax expenditure for local consumption, and the fact that promotional activities have a clear business purpose. They are performed to promote the, usually taxed, activities of businesses and are intrinsically liked to these business activities, and therefore they should not lead to additional VAT costs.

The steps that I took in this research to get to the answer of the central or main question, were all parts of the puzzle that is the VAT treatment of voucher transactions. There are many different types of vouchers, and using these different vouchers can have, and often has, different VAT consequences. Also, vouchers can be used for a plethora of promotional activities. As I demonstrated in this research, in many cases, the VAT treatment of vouchers depends on the VAT treatment of the actual underlying transactions to which the vouchers relate, which means that in those cases it can be argued that there is no 'VAT treatment of the voucher transaction' but only the VAT treatment of an underlying transaction that happens to involve the use of vouchers.

Answering the preliminary questions I described above, helped me to better understand what the EU VAT treatment of vouchers should be under appropriate law.

In Section 3 I research how to determine whether a supply is made free of charge. It is not always easy to establish whether vouchers, or the goods or services or the preferential treatment that the vouchers can be used for, are provided free of charge or for consideration. Under the current VAT rules, it can be argued that issuing free SPVs could lead to taxation at the time of issuing or transferring the SPVs, even though I am of the opinion that this should not be the case. It is also relevant to establish whether a voucher transaction was indeed performed for free, because the facts of a voucher transaction could, for example, lead to the conclusion that, actually, a consideration in kind was paid for the vouchers. The VAT treatment of vouchers that are supplied free of charge depends on different factors, as does the VAT treatment of the supply of goods or services in return for free vouchers. Using vouchers should not affect this 'direct link' between a payment and a (subsequent) supply.

In Section 4 I discussed how to determine whether a supply that is part of a composite supply (or: an element in a composite supply) that – as a whole – is made for consideration, is made free of charge. Some vouchers are 'given away for free' together with a supply of goods or services that is made for consideration. It can be argued that the EU VAT rules regarding composite supplies should also apply to transactions involving vouchers. If a free SPV is provided together with a good, it could be argued that the SPV, embodying the supply of the goods or services to which that SPV relates and which are deemed to be supplied at the time of transferring the SPV, is not an aim in itself for the customer, but a means of better enjoying the main supply. If that is the case, the SPV is 'absorbed' by that main supply and, as a general rule, (part of) the consideration for that main supply should also be allocated to the supply of the SPV. The VAT treatment of free vouchers is different from vouchers that were issued or transferred for consideration.

Vouchers are often used for granting discounts or rebates. The VAT treatment of discounts and rebates is discussed in Section 5. The VAT treatment of discounts or rebates should not be affected by the use of vouchers for obtaining these discounts or rebates. Specific types or discounts and rebates, leapfrogging over one or more parties in a transaction chain, require specific attention and were researched in-depth in that Section. These 'cash backs' and 'money off' schemes usually require the use of vouchers, issued by the party in the chain granting the 'cash back' or 'money off' to a customer at the end of the production and distribution chain. Effectively, these 'discounts' should be treated as third party payments with a right to deduct the VAT included in that payment. Change in legislation is required to achieve that.

Once it is established that a certain supply, involving a voucher, is performed free of charge, it has to be determined whether that transaction needs to be taxed, at what point in time it should be taxed and how to determine the taxable amount for these transactions. Also, if certain transactions involving vouchers that are performed for no consideration should not be taxed, such as the issue and transfer of MPVs, it should be determined what the proper VAT treatment of these transactions should be. The basis for answering these questions was laid in Section 6.

Vouchers can be the object of barter transactions. For example, a consumer can enter a competition to come up with the next promotional slogan for a product and win vouchers for obtaining goods or services of the brand owner or manufacturer responsible for the relevant product. The EU VAT treatment of barter transactions was discussed in Section 7, where the foundation was laid to answer this and other questions regarding the VAT treatment of barter transactions involving vouchers.

One of the most famous stories about a promotional activity involving a voucher is Roald Dahl's 'Charlie and the Chocolate Factory'. The people that would find a voucher, called the 'Golden Ticket', inside the wrapping of a product manufactured by the Wonka chocolate factory, would win a prize: a tour of the factory for two people. This is a story about a voucher as a prize. The EU VAT treatment of prizes that are given away for free are discussed in Section 8. As explained in that Section, from an EU VAT perspective, Mr. Wonka made a tax-friendly decision by giving away a service as a prize instead of supplying goods.

The EU VAT treatment of costs relating to voucher transactions in the context of promotional activities is based in the findings in Sections 6 and 8, which all contain research on the relevant EU VAT rules for deduction regarding the specific types of transactions discussed in those Sections.

The answers to all the above questions should lead to the answer to the main question of this research: How should transactions involving vouchers be treated from an EU VAT perspective? (Section 9).

In Section 9, I find that under the current EU VAT rules, a distinction exists between 'vouchers' as defined in Article 30a(1) of the EU VAT Directive and transactions involving other instruments that, in practice, can also be referred to as 'vouchers' but are not covered by the EU VAT definition. The EU VAT rules distinguish two types of 'vouchers': single purpose vouchers (SPVs), where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher, and multi purpose vouchers (MPVs), meaning a voucher other than an SPV.

Each transfer of an SPV made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the SPV relates. The actual handing over of the goods or the actual provision of the services in return for an SPV accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

The actual handing over of the goods or the actual provision of the services in return for an MPV accepted as consideration or part consideration by the supplier shall be subject to VAT, whereas each preceding transfer of that MPV shall not be subject to VAT.

These rules, that came into force on 1 January 2019, were intended to harmonise the way voucher transactions are taxed within the EU. However, as I demonstrated in this Chapter, these new rules did not solve all existing issues surrounding the VAT treatment of voucher transactions, but they created some new issues as well. In this Chapter, I have described tax technical issues as well as practical issues that are the result of the application of the EU VAT treatment under the current rules.

The VAT treatment of vouchers that are not covered by the EU VAT definition of 'voucher' are determined by the other relevant (general) provisions in the EU VAT Directive as well as CJEU case law.

Because in economic and commercial reality, vouchers are not the object or aim of a transaction, under desired and appropriate law, the supply and the issuing of vouchers should not subject to VAT (contrary to current EU VAT rules and regulations). However, these transactions should be considered economic activities entitling the supplier or issuer of the vouchers to deduct VAT on the costs relating to the supply or issuing of the vouchers, provided that the relevant requirements for deduction are met.

Vouchers embody proof that the holder of the voucher is entitled to something: a supply of goods, services or a discount to a transaction, usually because the voucher also proves that payment was already received for those future transactions. The taxable amount for the underlying transaction should be the amount actually received by the supplier of the goods or services for which the voucher is redeemed. It can be difficult to establish what this amount is if other considerations, for example for the distribution of vouchers or for being allowed to be part of a specific voucher scheme, are settled with the consideration for the supply of goods or services for which the voucher is used.

10.4 In conclusion

In this research I have tested positive law with regard to the VAT treatment of vouchers in the context of promotional activities, as well as promotional activities as such, to norms that are derived from and based on the purpose of the EU VAT system and on economic and commercial reality. I have used theoretical sources to substantiate my findings and views.

I have determined that the existing methods of determining the VAT treatment of promotional activities in general, and transactions involving vouchers in particular, whether based on the current VAT Directives or existing case law, are mostly in line with the relevant principles underlying the EU VAT system. Where they are not, I have suggested alternative VAT treatments, which are more in line with the purpose of EU VAT as well as the economic and commercial reality of these transactions.

Given the (proposed as well as adopted) changes to the EU VAT Directive with regard to the VAT treatment of transactions involving vouchers as well as the ever-increasing amount of cases referred to and ruled by the CJEU on topics related to or relevant to

promotional activities and to transactions involving vouchers, it can be said that the rules relating to these types of transactions are still developing. I hope that with this research, and more specifically where I addressed situations where existing rules are not in line with positive law and where I have made suggestions, I have made a positive contribution to these developments.

Nederlandse samenvatting

1. Inleiding

Ik heb onderzoek gedaan naar de Unierechtelijke btw-behandeling van vouchertransacties in het kader van promotionele activiteiten, waarbij ik de btw-behandeling op basis van positief recht vergelijk met de btw-behandeling op basis van 'wenselijk recht'. Ik kom tot wenselijk recht door de btw-behandeling van de relevante transacties te toetsen aan de 'economische realiteit' van deze transacties en het doel van het EU btw-systeem, namelijk (kort gezegd)het belasten van bestedingen voor lokale particuliere consumptie.

Om tot het antwoord op mijn belangrijkste onderszoeksvraag te komen ("wat is de juiste btw-behandeling van vouchers in het kader van promotionele activiteiten"), moet een aantal preliminaire stappen worden gezet. Deze stappen zijn bedoeld om het volledige 'btw-landschap' dat relevant is voor mijn hoofdvraag, in kaart te brengen en te begrijpen. Daartoe moeten worden onderzocht en beantwoord:

- Hoe moet worden bepaald of een transactie om niet of tegen vergoeding is verricht?
- Hoe moet worden bepaald of een element dat deel uitmaakt van een samengestelde prestatie die - als geheel – tegen vergoeding wordt verricht, om niet wordt verricht?
- Welke gratis prestaties zijn, en welke zouden moeten worden, belast en hoe kan dit het best worden bereikt? Wat moet de heffingsmaatstaf zijn voor dergelijke gratis prestaties?
- Wat moet de btw-behandeling zijn van kortingen of rabatten? En is dat anders voor kortingen en rabatten die worden toegekend aan andere personen dan de daadwerkelijke ontvanger van de oorspronkelijke transactie?
- Wat moet de heffingsmaatstaf zijn voor ruiltransacties?
- Kan de btw op kosten voor het uitvoeren van promotionele activiteiten altijd volledig worden afgetrokken? Moet deze btw altijd aftrekbaar zijn?

De bovengenoemde deelvragen kunnen worden samengevat als: "hoe moeten promotionele activiteiten worden behandeld vanuit een EU btw-perspectief " De antwoorden op alle bovenstaande vragen moeten leiden tot het antwoord op de hoofdvraag van dit onderzoek:

- Hoe moeten transacties met vouchers worden behandeld vanuit EU-btw-perspectief?

Hieronder ga ik kort in op de beschreven deelvragen.

2. Wordt een transactie tegen vergoeding verricht?

De eerste deelvraag betreft het bepalen of een prestatie tegen vergoeding dan wel om niet wordt verricht. Prestaties worden tegen vergoeding verricht (en zijn niet gratis),

wanneer een rechtstreeks verband bestaat tussen de prestatie en de vergoeding die in ruil voor die prestatie wordt ontvangen. Er is sprake van een rechtstreeks verband in deze zin als er een juridische overeenkomst bestaat tussen de presterende partij en diens afnemer als basis voor de prestatie en de tegenprestatie. Zonder een rechtstreeks verband tussen een prestatie en een tegenprestatie, of als een prestatie wordt verricht zonder een overeengekomen vergoeding, wordt de prestatie geacht ‘om niet’ te zijn verricht. Zo is bijvoorbeeld het geld dat een orgeldraaier in zijn bakje ontvangt voor het spelen van muziek op straat niet een vergoeding in de zin van de btw, omdat er geen juridische overeenkomst is op grond waarvan de toehoorders een afgesproken bedrag betalen.

3. Samengestelde prestaties

Als eenmaal is vastgesteld dat sprake is van een prestatie tegen vergoeding, kijk ik vervolgens naar samengestelde prestaties. Ik wil bepalen of alle elementen van een samengestelde prestatie die (als geheel) tegen vergoeding wordt verricht, tegen vergoeding zijn verricht (ook als elementen bijvoorbeeld als ‘gratis’ zijn aangeprijsd). Als sprake is van gratis elementen, moet de vergoeding over de ‘betaalde’ elemente worden verdeeld en hangt de btw-behandeling van de elementen die gratis worden geleverd af van een aantal verschillende factoren.

Specifieke elementen in betaalde samengestelde prestaties die als ‘gratis’ worden aangeprijsd, worden in de regel ook voor de btw als ‘gratis’ beschouwd. De 'juridische realiteit' of de contractuele overeenkomst tussen de verrichter van de transactie en de ontvanger daarvan, zou de basis moeten zijn voor het bepalen van de btw-behandeling van een transactie, tenzij de ‘economische en commerciële realiteit’ dusdanig daarvan afwijkt dat deze leidend moet worden geacht (substance over form).

In de volgende gevallen kunnen leveringen met meerdere elementen, waaronder een element dat als gratis wordt aangeboden, worden behandeld alsof alle elementen tegen vergoeding worden aangeboden (gebaseerd op de economische en commerciële realiteit van deze transacties):

- transacties waarbij het 'gratis’ element opgegaan in de samengestelde prestatie door absorptie of samenvoeging;
- transacties waarbij het 'gratis’ element een absolute en relatief hoge waarde heeft;
- transcties die zogenaamde 'combinatie-aanbiedingen' zijn;
- transacties waarbij de klant de 'gratis' levering moet accepteren en geen keuze heeft om deze niet te accepteren; en
- transacties waarbij het 'gratis' element een expliciet onderdeel is van de onderhandelde, overeengekomen prestatie.

Dit betekent dat tenzij een van de bovenstaande situaties zich voordoet, het element van een samengestelde levering die wordt geadverteerd als 'gratis', voor de btw echt ‘om niet’ wordt verstrekt. Dit roept de vraag op hoe gratis transacties moeten worden

behandeld vanuit btw-perspectief, maar voordat ik aan die vraag toekom, behandel ik eerst een andere vraag.

4. The VAT treatment of discounts and rebates

De huidige EU-btw-regels en -voorschriften voor het bepalen van de btw-behandeling van kortingen of rabatten die worden toegekend aan de daadwerkelijke kopers van de goederen en diensten die worden geleverd door de onderneming die deze kortingen of kortingen verleent, zijn vrij eenvoudig en in overeenstemming met de beginselen die ten grondslag liggen aan het EU-btw-stelsel : ze zorgen ervoor dat de maatstaf van heffing voor de oorspronkelijke levering wordt verlaagd met het bedrag van de korting of rabat.

In de praktijk stimuleren bedrijven de verkoop van hun producten niet alleen door de aankoop van deze producten te financieren door middel van 'directe' kortingen of rabatten, maar ook door 'kortingen' te geven aan afnemers van hun producten verderop in de productie- en distributieketen. Gewoonlijk krijgen eindgebruikers deze kortingen, bijvoorbeeld van de fabrikanten van producten. In de praktijk worden deze kortingen of rabatten meestal toegekend door middel zogenaamde 'cash backs' of 'money offs', waarbij vaak de detailhandelaar wordt betrokken die deze producten aan de eindconsument verkoopt.

Het HvJEU heeft besloten om dit soort kortingen of rabatten op dezelfde manier te behandelen als directe kortingen of rabatten, waardoor de maatstaf van heffing van de oorspronkelijke levering van het product (die niet werd geleverd aan de persoon die de daadwerkelijke karting geniet) wordt verlaagd. Ik heb aangetoond dat deze oplossing een aantal problemen opwerpt die niet in overeenstemming zijn met de beginselen die ten grondslag liggen aan het EU-btw-stelsel.

Ik heb ook een alternatief voor dit systeem voorgesteld, gebaseerd op de economische en commerciële realiteit van het financieren van de aankoop van een product door een partij die niet de directe afnemer is van degene die de aankoop van dat product financiert. Ik heb een oplossing voorgesteld met de naam 'joint payment, shared deduction' ('gezamenlijke betaling, gedeelde aftrek'). Deze oplossing gaat ervan uit dat het 'gefinancierde' product gedeeltelijk wordt afgenomen door degene die het product financier (voor zover hij die aankoop financiert). Dit opent de deur naar btw-aftrekt door de financier op 'zijn deel van de aankoop'. In principe worden dergelijke kosten dan niet anders behandeld dan, bijvoorbeeld, advertentiekosten.

5. Hoe om te gaan met 'gratis' prestaties

EU-btw is een belasting op een belastingverbruik dat wordt geheven door de uitgaven voor lokale particuliere consumptie te belasten. Als bedrijfsmiddelen zonder vergoeding worden geleverd en deze goederen worden 'verbruikt' (d.w.z. ze verlaten de productie- en distributieketen en worden gebruikt of toegepast voor consumptieve

doeleinden), moeten ze ook worden belast. Dit kan worden gedaan door ofwel de eerdere btw-aftrek op uitgaven voor deze transacties ongedaan te maken (hetzij op het moment van aankoop of met terugwerkende kracht) of door deze transacties te behandelen alsof ze tegen vergoeding worden verricht, wat betekent dat ze aan btw-heffing zijn onderworpen.

De EU-wetgever voor de laatste methode gekozen voor de btw-behandeling van bepaalde prestaties die om niet worden verricht. Deze methode heeft de voorkeur boven het niet toestaan van volledige of gedeeltelijke btw-aftrek op het moment van de aankoop van goederen of diensten, omdat dit een zekere mate van willekeur impliceert die niet strookt met de relevante beginselen die ten grondslag liggen aan het EU-btw-stelsel. Retroactieve aanpassing van een eerdere aftrek als gebaseerd op consumptief gebruik of toepassing heeft min of meer hetzelfde effect als het belasten van het consumptieve gebruik of de toepassing van goederen of diensten.

Wanneer de particuliere consumptive van de prestaties ondegeschikt is aan de bedrijfsdoeleinden waarvoor de gratis prestaties worden verricht, moeten deze prestaties niet worden belast. Binnen de huidige regels wordt deze redenering toegepast op het gratis verrichten van diensten, maar niet op de gratis levering of gebruik van bedrijfsmiddelen (goederen). Dit wordt in de regel behandeld prestatie onder bezwarende titel (en daarmee onderworpen aan btw), tenzij de betreffende goederen als monsters of als geschenken van geringe waarde kwalificeren. Naar mijn mening mogen overheersende zakelijke redenen voor de kosteloze toepassing of levering van bedrijfsmiddelen niet aan btw worden onderworpen. Dit is ook gebaseerd op het neutraliteitsbeginsel, dat vereist dat transacties van voldoende gelijkaardige aard vanuit btw-perspectief hetzelfde worden behandeld.

Ik behandel tevens of gratis prestaties die op grond van de btw-regelgeving worden behandeld als waren zij tegen vergoeding verricht, onder de toepassing van een aantal andere btw-regels vallen, zoals die beteffende de plaats van prestatie, de vrijstellingsbepalingen, de factuurverplichtingen etc.

6. Ruiltransacties

Ruiltransacties zijn twee gelijktijdige leveringen van goederen of diensten tegen vergoeding, waarbij de vergoeding voor beide leveringen als hetzelfde bedrag worden beschouwd en deze bedragen met elkaar worden verrekend, waardoor effectief geen contante betalingen worden gedaan. Volgens de huidige EU btw-regels is de berekeningsmethode van de maatstaf van heffing voor deze ruiltransacties gebaseerd op de regels voor de berekening van de maatstaf van heffing voor gratis leveringen van goederen en diensten. Voor goederen wordt de maatstaf van heffing beschouwd als de aankoopprijs van de goederen of van soortgelijke goederen of, bij gebrek aan een aankoopprijs, de kostprijs, bepaald op het moment van de levering. Het belastbare bedrag voor diensten zijn de gemaakte kosten voor het verlenen van de diensten. In mijn proefschrift toon ik aan dat toepassing van deze methode voor het bepalen van de

maatstaf van heffing voor ruiltransacties tot resultaten leidt die niet volledig in overeenstemming zijn met enkele van de relevante onderliggende beginselen van het EU-btw-stelsel of de economische en commerciële realiteit van deze ruiltransacties.

Daarom heb ik voorgesteld de maatstaf van heffing in deze situaties te bepalen op basis van de economische en commerciële realiteit van deze transacties. Ten eerste zouden belastingplichtige partijen bij ruiltransacties overeenstemming moeten bereiken over de waarde van hun leveringen. Als dit onmogelijk blijkt of als niet-belastingplichtigen bij de ruiltransactie betrokken zijn, moet de 'normale waarde' ('open market value') van de transacties worden gebruikt om de maatstaf van heffing vast te stellen. Dit zou een wijziging van de bestaande EU btw-regels vereisen.

Wanneer een "betaling in natura" voor een levering van goederen of diensten geen reële economische waarde heeft voor de ontvanger daarvan, maar waarbij het (meer) een voorwaarde betreft om in aanmerking te komen voor een korting of een levering, is de "betaling in natura" geen tegenprestatie en is de transactie is geen ruiltransactie.

7. Aftrek van btw

Het systeem van aftrek van btw is bedoeld om bedrijven volledig te ontlasten van de btw die betaald of betaald wordt in het kader van al hun economische activiteiten. Het EU-BTW-stelsel voor een volledige neutraliteit van belastingheffing van alle economische activiteiten, ongeacht het doel of de resultaten ervan, op voorwaarde dat zij in beginsel onderworpen zijn aan btw.

Om voor btw-aftrek in aanmerking te komen, moeten de aangekochte goederen of diensten een rechtstreeks en onmiddellijk verband houden met de uitgaande handelingen die aanleiding geven tot het recht op aftrek. In beginsel is het bestaan van een rechtstreeks en onmiddellijk verband tussen een specifieke inputtransactie en een bepaalde outputtransactie of transacties die recht geven op aftrek noodzakelijk voordat een belastingplichtige recht op aftrek van voorbelasting heeft en om de omvang van dergelijk recht te bepalen. Vragen met betrekking tot de afterk van btw zijn – waar relevant - verwerkt in de desbetreffende hoofdstukken van mijn proefschrift. Naar mijn mening kan en moet de btw op de gemaakte kosten voor het uitvoeren van vouchertransacties en promotionele activiteiten altijd volledig worden afgetrokken, tenzij de kosten verband houden met activiteiten waarvoor btw is vrijgesteld.

Ik heb in het bijzonder gekeken naar de btw-behandeling van gratis promotionele kansspelen (waar ook voucher een rol kunnen spelen). Volgens de huidige EU-btw-regels hebben de kosten van goederen en diensten die door de organisator van een gratis loterij zijn verkregen geen directe en directe link met de gratis loterijactiviteiten. Dit betekent dat de btw op de kosten van deze goederen en diensten kan worden afgetrokken als btw op 'algemene kosten' of 'algemene kosten', volgens het algemene btw-aftrekrecht van het bedrijf. De Nederlandse jurisprudentie wijkt hiervan af.

8. Vouchertransacties

De centrale vraag van dit onderzoek is hoe vouchertransacties die worden uitgevoerd in het kader van promotionele activiteiten, moeten worden behandeld vanuit het oogpunt van de EU-btw. Promotionele activiteiten die door derden worden verricht voor ondernemers, waarbij de ondernemer in wezen de ontvanger van deze promotionele activiteiten is, vallen buiten het bereik van dit onderzoek omdat deze activiteiten niet worden uitgevoerd met vouchers die door het bedrijf zelf zijn uitgegeven. De focus van dit onderzoek ligt ook op het spanningsveld het moeten belasten van transacties die tot consumptie leiden, maar die tevens een duidelijk zakelijk doel hebben. Ze worden uitgevoerd om de, meestal belaste activiteiten van bedrijven te promoten en zijn intrinsiek gekoppeld aan deze bedrijfsactiviteiten, waardoor ze niet tot extra btw-kosten zouden moeten leiden.

Er bestaan veel verschillende soorten vouchers. Het gebruik van deze verschillende vouchers kan verschillende btw-consequenties hebben en heeft dat ook vaak. Vouchers kunnen worden gebruikt voor een overvloed aan promotionele activiteiten. Ik meen dat vouchers nooit het daadwerkelijke object van een transactie zijn, maar slechts een middel, een tussenstap, binnen een transactie. In mijn onderzoek toon ik aan dat de btw-behandeling van vouchers (daarom) in veel gevallen afhankelijk is van de btw-behandeling van de feitelijke, onderliggende transacties waarop de vouchers betrekking hebben. Dit betekent dat in die gevallen kan worden aangevoerd dat geen sprake is van de "btw-behandeling van de voucher-transactie" maar alleen van de btw-behandeling van de onderliggende transactie die toevallig het gebruik van vouchers met zich meebrengt. Naar 'wenselijk recht' is een definitie van voucher voor de btw dan ook niet nodig, net als specifieke btw-wetgeving voor vouchertransacties.

Het huidige recht is anders. Onder de huidige EU btw-regels bestaat een onderscheid tussen 'vouchers' zoals gedefinieerd in artikel 30a, lid 1, van de EU Btw-richtlijn en transacties met andere instrumenten die in de praktijk ook kunnen worden aangeduid als 'vouchers' maar die niet vallen onder de EU btw-definitie van voucher.

De EU btw-regels onderscheiden twee soorten 'vouchers': single purpose vouchers (SPV's), waarbij de plaats van levering van de goederen of diensten waarop de voucher betrekking heeft en de btw die op die goederen of diensten verschuldigd is, op dat moment bekend zijn. Verder zijn er multi-purpose vouchers (MPV's), alle voucher (voor de btw) die geen SPV zijn.

Deze regels, die op 1 januari 2019 in werking zijn getreden, waren bedoeld om de manier waarop vouchertransacties binnen de EU worden belast, te harmoniseren. Ik heb aangetoond, hebben deze nieuwe regels echter niet alle bestaande problemen met betrekking tot de btw-behandeling van vouchertransacties opgelossen, en zelfs nieuwe problemen opwerpen.

Onder de huidige btw-regels kan worden gesteld dat het uitgeven van gratis SPV's kan leiden tot belastingheffing op het moment van uitgifte of overdracht van de SPV's, hoewel ik van mening ben dat dit niet het geval zou moeten zijn. De ‘belofte van een gratis goed of dienst’ moet niet worden belast.

Als een ‘gratis’ SPV samen met een goed of dienst wordt verstrekt, bestaan er gevallen waarin de SPV (of de onderliggende prestatie) geen doel op zich is voor de klant, maar een middel om de hoofdprestatie aantrekkelijker te maken. In dat geval wordt de SPV "geabsorbeerd" door die hoofdprestatie en hebben het verstrekken noch het inwisselen van deze SPVs eigen btw-gevolgen.

De btw-behandeling van vouchers die niet vallen onder de EU-BTW-definitie van voucher, wordt bepaald door de bestaande relevante (algemene) bepalingen in de EU Btw-richtlijn en de jurisprudentie van het HvJEU.

De btw-behandeling van vouchertransacties is nog steeds in ontwikkeling. Ik hoop dat ik met mijn onderzoek, en meer in het bijzonder in situaties waarin bestaande regels of jurisprudentie niet in overeenstemming zijn met wenselijke recht en waarvoor ik suggesties heb gedaan, een positieve bijdrage aan deze ontwikkeling heb geleverd.

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Keyword register

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